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IN THE
SUPREME COURT OF THE UNITED STATES

NOVEMBER TERM, 1955.

No. 839.

THE BOARD OF COUNTY COMMISSIONERS OF WYANDOTTE COUNTY, KANSAS,
Petitioner,

vs.

WILLIAM J. HOWARD, INC., a Corporation Organized under the Laws of the State of Illinois,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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WILLIAM J. HOWARD, INC., a Corporation Organized under the Laws of the State of Illinois,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable, The Chief Justice of the United States, and The Associate Justices of the Supreme Court of the United States:

This is a petition by the Board of County Commissioners of Wyandotte County, Kansas, a municipal corporation, for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit rendered in the above-entitled cause, which affirmed the judgment of the United States District Court for the District of Kansas.

OPINION BELOW.

The opinion and judgment of the United States Court of Appeals for the Tenth Circuit (R. 3, App. A1) is not yet officially reported. No opinion was written by the District Judge.

JURISDICTION.

The judgment of the United States Court of Appeals for the Tenth Circuit was filed and entered February 7, 1956. Petitioner's petition for rehearing was timely filed on February 24, 1956, and was denied by order entered March 2, 1956.

The jurisdiction of this court is, accordingly, invoked by virtue of 28 U. S. C., Sec. 1254, Paragraph (1), 62 Stat. 928.

QUESTIONS PRESENTED FOR REVIEW.

1. The public improvement contract of the petitioner and respondent must be enforced between the parties according to all of its terms in the absence of a determination of bad faith, fraud or deceit.

2. The Court of Appeals committed error in the interpretation of the public improvement contract in the following particulars:

(a) That it did not follow the general law of the State of Kansas.

(b) The opinion and judgment rendered and entered is in conflict with the decisions of United States Courts of Appeals of other circuits on the same matter.

(c) The opinion and judgment is contrary to and in conflict with the decisions of the United States Supreme Court on the same matter.

3. The Court of Appeals, in affirming the District Court, has departed from the accepted and usual course of procedure in the introduction of documentary evidence in the nature of abstracts or summaries of voluminous records and documents without the supporting records and documents being before the Court, or in the jurisdiction, or being made available for inspection by the Court or counsel either before, during or after the trial.

STATEMENT.

An action was instituted in the District Court by the respondent against The Board of County Commissioners of Wyandotte County, Kansas, a *quasi* municipal corporation, for the recovery of $179,759.63 damages following a partial rebuilding of a bridge in Kansas City, Kansas. The subject bridge was partially destroyed by high water. The petitioner, pursuant to pertinent statutes of the State of Kansas, entered into a contract with the respondent for the partial rebuilding of the bridge for the sum of $326,719.66. Among other things, the contract provided for the construction of a new pier (No. 2) to be located in the channel of the river and replacement of parts of the superstructure between the existing piers and the new pier.

The contract consisted of a formal agreement and certain other documents, all of which are a part of the contract, namely, the Standard Specifications of the Highway Commission of the State of Kansas, numerous supplemental specifications to govern the work peculiar to the job in question; also detailed plans showing with precision

the exact location of all piers and the size and dimension of the parts of superstructure of the bridge.

The respondent submitted a written proposal, which forms a part of the contract, to perform the required work for the contract price above stated. The respondent, being the lowest bidder, was awarded the contract in question.

After the contract was awarded and the contract entered into, no alteration, modification or change was made to any part thereof, nor in the plans and specifications. No written orders were given by your petitioner to respondent for extra, special or force account work and none was requested by the respondent. The plans were admitted by the respondent to be good and sufficient.

Your petitioner, pursuant to Kansas statute, employed engineers to assist in the preparation of the plans and specifications and to perform certain other services.

The contract required completion within 300 days. The respondent, pursuant to notice to start work as provided in the contract, proceeded with the construction of the bridge and required a period of 778 days to complete the work, or a total of 478 days beyond the contracted completion time.

The plans for the construction show with certainty the exact distances between all piers, both new as well as those left in place. The respondent contended that prior to the awarding of the contract, it requested the engineer of your petitioner for the location of the site for the construction of the new pier and the engineer pointed to some debris upon the surface of the water and said such new pier was to be located in the bed of the river at the point where the debris appeared. The respondent contends that the excavation for the new pier was started at

such site. However, the respondent contends that it later discovered that such pointing was in error thus resulting in needless extra or special work on its part, for which the Court of Appeals sustained the allowance of $136,656.47. Your petitioner contends that the respondent was bound by the distance and location for the new pier as shown on the plans with exactness and by the provisions of the contract in locating the site for the construction of the new pier by virtue of the provisions contained in the supplemental specifications forming a part of the contract which provide "the contractor (respondent) must assume full responsibility for successfully carrying out the complete construction and for the fit of all members. Plans showing the detail of the existing structure may be inspected at the office of the County Engineer of Wyandotte County, Kansas, but the contractor (respondent) must make sufficient field measurements to determine definitely the actual distances between piers and the actual dimensions of other parts of the existing structure to be left in place in order to fit accurately the new work to the old."

The Court determined that the remains of the washed out Pier No. 2 changed its location. Your petitioner nor respondent had no knowledge of any such change in location and the Court did not so find. The supplemental specifications warned that there may have been displacement at the time the pier washed out and provided that the contractor should make his own determination as to the amounts of debris, etc., necessary to be removed in order to build the new pier (No. 2). See supplemental specifications App. Page A12.

The contract provided for partial payment to the respondent upon claims for payment being submitted by it on estimates of partial completion approved by the engineer. Such claims were made almost monthly during

the reconstruction. The respondent did not make any claim for extra compensation upon the basis for which damages are sought in the complaint. Claims for partial payment were made and accepted in the manner provided in the contract until the completion of the work, the first and last of which are shown at Pages 241 and 245 of the transcript of record. Shortly thereafter the claim herein for $163,087.66 was filed and was disallowed by your petitioner.

The respondent nowhere claimed, nor was any showing made, of bad faith, fraud or deceit on the part of your petitioner.

The Standard Specifications of the Highway Commission of the State of Kansas (which are uniform throughout the United States) contain provisions covering the allowance for payment of any special, extra or force account work, the pertinent parts of which are contained in the transcript of the record, Vol. II, Pages 186, 189 to 192 (App. A13). No supplemental agreement was requested by the respondent and none exists with respect to any of the work for which respondent claimed additional compensation, nor was any approval thereof given or made by the engineer in charge of such work, either in writing or otherwise, all as required by the aforementioned specifications.

The action was tried to the Court without a jury. The trial court separately heard and determined the question of liability of the petitioner and subsequently submitted the question of ascertainment of damages to a Special Master. Respondent's proof of damages before the Special Master consisted of production of copies of the ledger sheets and a cost summary, the first of which was an original record of the respondent and the second of which was kept by respondent during the course of its

business for the purpose of allocating costs. Other evidence to support respondent's claim for damages was in the nature of summaries prepared by respondent's auditors, not under the jurisdiction of the court and the supporting data for which was not in court nor offered or made available for the inspection of the Special Master or counsel prior to or after being received in evidence.

Upon completion of the contract there was a balance due of $16,671.97, which was held by your petitioner in partial satisfaction of the liquidated damage provision of the contract for failure to complete within the required time.

The respondent in this case is a citizen of the State of Illinois. Your petitioner is a *quasi* municipal corporation of the State of Kansas. The amount in controversy exceeds the sum of $3,000.00.

ARGUMENT.

I.

A Public Improvement Contract Must Be Enforced Between the Parties According to All of Its Terms in the Absence of a Determination of Bad Faith, Fraud or Deceit.

The contract in this case is typical of public improvement contracts which have been before the courts for interpretation and construction in a number of cases. The contract consisted of a written proposal submitted by the respondent wherein he proposed to furnish the material and perform the required work for the building of the bridge in strict accordance with the contract documents for the prices given in an attached schedule, the total of which prices constituted the contract price. In the pro-

posal the respondent declared that he had visited the site and carefully examined the contract documents relating to the work and would perform the work and furnish the materials in strict accordance with the contract documents for the sums set forth.

Annexed to and a part of the contract documents were a number of supplemental specifications in which it was provided that the Standard Specifications of the Highway Commission of the State of Kansas (which are approved by the Bureau of Federal Roads and uniform throughout the United States) were to be used in carrying out the rebuilding of the bridge, except where supplemental specifications were provided for certain of the work peculiar to the reconstruction of the bridge in question. The supplemental specifications specifically provided that they should govern when they were in conflict with the Standard Specifications. The supplemental specifications pertinent to this controversy are contained in the certified transcript of the record, Pages 9 to 13, inclusive, and for convenience are reproduced in the appendix hereto (App. A9-A12).

Also a part of the contract documents were a complete set of plans showing in detail the dimensions of various parts of the bridge including the distances between piers, and location of Pier No. 2 to be constructed under the provisions of the contract, and the size and dimension of various parts of the superstructure, all of which were admitted by the parties hereto to be complete and sufficient to carry out the work provided for in the contract. Because of the character of the work required by the contract, certain supplemental specifications were provided to warn and advise contractors submitting proposals of the uncertain conditions which might be encountered in connection with the work, such as Paragraph 2 of the

special provisions of supplemental specification 12 appearing at Page 12 of the certified transcript of the record wherein it is stated that portions of the debris from old Pier No. 2 had been removed and that foundation and steel sheet pile remained in place except as they may have been displaced at the time the pier was washed out, and further warned that it was not guaranteed that all of the debris had been removed and that the contractor (respondent) should make his own determination as to the amount of debris, piling, etc., which it would be necessary for him to remove in excavating and building at Pier No. 2. The supplemental specifications further provided that the contractor (respondent) must make sufficient field measurements to determine definitely the actual distances between piers and the actual dimensions of the other parts of the existing structure to be left in place to fit the new work to the old.

Without being burdensome and to eliminate repetition, it is fair to say that the contract and all of the documents forming a part thereof were complete and accurate in every detail and entirely sufficient for the purpose of accomplishing the contemplated work. The respondent has made no complaint through this case of any error or insufficiency in the plans, specifications or contract documents.

Nowhere in this case has there been any claim, finding or determination of misrepresentation, bad faith, fraud or deceit on the part of petitioner.

The well settled rule of law in the interpretation and construction of public improvement contracts is that the parties are bound by the provisions of the contract as entered into in the absence of a finding and determination of bad faith, fraud, deceit or misrepresentation which amounts to a warranty. This rule is laid down in *Middle*

West Const. v. *Metropolitan Dist.*, 2nd Cir., 133 F. 2d 468, 470, wherein it is stated:

> "The contention that, if the plaintiff cannot recover under the contract, it should be allowed recovery 'outside of the contract' cannot be sustained on the record. There was no fraud, misrepresentation or misleading by the defendant in the plans and specifications upon which the contract was based."

See also *Highway Const. Co. of Ohio* v. *City of Miami, Fla.*, 5th Cir., 126 F. 2d 777, 781, where the Court specifically holds that in absence of a showing of bad faith, fraud or deceit on the part of the engineer, the city, or its agent, the contractor cannot recover for extra work not authorized by the contract or the engineer.

The leading case on misrepresentation connected with public improvement contracts is *MacArthur Bros. Co.* v. *United States*, 258 U. S. 6, 66 L. Ed. 433, 42 Sup. Ct. Rep. 225, wherein the Supreme Court in passing upon the question of misrepresentation stated:

> "In the case at bar the government undertook a project and advertised for bids for its performance. There was indication of the manner of performance, but there was no knowledge of impediments to performance, no misrepresentation of the conditions, exaggeration of them, nor concealment of them; nor, indeed, knowledge of them. To hold the government liable under such circumstances would make it insurer of the uniformity of all work, and cast upon it responsibility for all of the conditions which a contractor might encounter, and make the cost of its projects always an unknown quantity. It is hardly necessary to say that the cost of a project often determines for or against its undertaking."

II.

The Court of Appeals Did Not Follow the General Law of the State of Kansas.

This case being one involving the interpretation of a contract, the general law of Kansas should be applied under the doctrine and authority established in the case of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 Sup. Ct. Rep. 817, 82 L. Ed. 1188.

Like cases arising out of the construction of contracts for public improvements have been decided by the Supreme Court of Kansas and rules of general law thereabout have been established.

The Court of Appeals in its opinion and judgment entered herein (App. A12) did not cite, discuss or follow any of the like or similar cases which your petitioner seriously contends are controlling in the consideration of this cause.

One of such cases is *Hutchinson* v. *White*, 80 Kan. 37, 101 Pac. 458. In that case the City let a contract according to plans and specifications prepared by its engineer for the digging of a canal. The specifications provided the dirt should be deposited in a specified space. Later it was determined the space designated would not contain the dirt. The size of the dumping grounds was clearly stated. The engineer had made an error and miscalculated the space, causing much additional labor to what would have been necessary if the mistake in the specifications had been discovered earlier. The contractor made a claim for extra work. The Supreme Court of Kansas held that the mistake was a mere error in mathematics and denied recovery and in passing upon the responsibility of the contractor stated:

> "A careful contractor would have ascertained whether the fifty-foot strip reserved for the dirt ex-

> cavated was sufficient or not. When the contractor discovered that it was insufficient the question should have been settled by the parties in the manner provided in the contract. The canal, as finally constructed, was just as the contractor and the city contemplated when the contract was entered into. Each party knew the dimensions of the canal, and by a proper use of ordinary mathematics could have ascertained how much dirt would have to be excavated and how much space it would occupy when removed. Whatever misleading or erroneous conclusions might be reached by either party in the manipulation of figures concerning these problems, the practical fact stood clearly before them that the contractor had agreed to excavate and remove all the dirt from the canal and deposit it upon the adjacent land. This was the work he undertook to do. Each of the parties understood this alike. Nothing could mislead them into a misconception or misunderstanding as to this proposition, and no mathematical measurement or estimate could affect the work to be done."

Another case is that of *Scherrer* v. *State Highway Comm.*, 148 Kan. 357, 80 P. 2d 1105. This case involved excavation for a state highway, the construction of which was subject to the Standard Specifications of the Highway Commission of the State of Kansas, being the same Standard Specifications involved in the present cause. In that case the plaintiff, the contractor, brought an action against the State Highway Commission on the theory that the plans and specifications furnished by the Commission stated there would be so many yards of rock and so many yards of earth, and that the plaintiff made a bid to excavate unclassified materials on the basis of the proportions of earth and rock given in the specifications, and that as a matter of fact it was necessary to move a substantial amount of rock over and above the amount given in the specifications, and that the plaintiff should there-

fore be allowed to recover the added expense he was put to in removing the rock. A demurrer to the petition was filed by the State Highway Commission and was sustained in the District Court, which action was thereafter affirmed by the Supreme Court. The court, in disposing of this case, stated in its opinion as follows:

> "How can a contractor who examined these plans and specifications, made this proposal, and signed this contract, say he had a right to rely on the quantities named in the plans? The very nature of the type of bid called for precludes such a construction. The bid being asked to be made on unclassified excavation was notice to plaintiffs that a careful examination should be made so that the proportion of rock and earth might be known and correctly calculated.
>
> "Plaintiffs bring several authorities to our attention and rely on them to sustain their position. Many of them are federal cases. Some of them are discussed and distinguished in *MacArthur Bros. Co. v. United States*, 258 U. S. 6, 11, 42 S. Ct. 225, 66 L. Ed. 433. In that case the petition of the plaintiff alleged that the government had misrepresented a proposed contract by stating that a portion of the work would be done in the 'dry' and a portion of it in the 'wet' at a cost greatly exceeding what it would have been had it been done the other way. The contractor had made a proposal and examined specifications containing provisions about the same as those we have here. The company contended certain conditions and surrounding circumstances amounted to misrepresentation by the United States. In dealing with this contention the court said:
>
> " 'But in reality there was no representation by the government, nor is it alleged that the government had knowledge of the conditions or means of knowledge superior to the knowledge of the company. The latter acquired knowledge only by the aid of divers as its work progressed. Such being

the situation, does not the case present one of misfortune rather than misrepresentation? It is true that the government's proposal was for a certain part of the work to be done in the dry, but it made no representation of the conditions that existed enabling it to be so done or precluding it from being so done.'

"* * * We feel that the MacArthur Brothers case is in point here. See, also, *H. W. Golden & Son* v. *Inhabitants of Town of Marblehead*, 68 F. 2d 875, also *Elkan* v. *Sebastian Bridge Dist.*, 291 Fed. 532."

For another recent case of the Supreme Court of Kansas to the same effect see *Neale Construction Company* v. *Topeka Township Sewer District*, 178 Kan. 359, 285 P. 2d 1086.

The general law of Kansas therefore is that the parties are bound to perform under the terms of the contract and may recover only under the provisions therein contained, and not outside the contract unless it may be legally avoided by a finding of bad faith, fraud, deceit or misrepresentation amounting to a warranty. Furthermore the Supreme Court of Kansas has followed the decisions of the Supreme Court of the United States in the *MacArthur Brothers case, supra*, and the decisions of Courts of Appeal of circuits other than the Tenth Circuit.

III.

The Opinion and Judgment of the Court of Appeals of the Tenth Circuit Are Contrary to and in Conflict with Decisions of the United States Supreme Court and United States Courts of Appeal of Other Circuits on the Same Matter.

The Court of Appeals of the Tenth Circuit in its opinion has determined liability upon your petitioner by hold-

ing that it was the duty of your petitioner to furnish the correct site for the work. The Court in its opinion also decided that the pointing out of a spot where part of the piling of the old pier showed on the surface of the water was the designation of the place where the new pier should go.

The position of your petitioner is that if recovery is allowed in this case it must be under the provisions of the contract, but before an award of damages is sustained, there must be a showing and finding of bad faith, deceit, fraud or misrepresentation amounting to a warranty before a recovery may be had outside of the terms of the contract. The pointing out of a spot in the river as relied upon by the Court of Appeals in establishing liability does not constitute bad faith, fraud, deceit or misrepresentation for the reason that such pointing out was made prior to the time a proposal was submitted by the respondent. The respondent at the time of submitting the proposal represented that he had visited the site of the work and was familiar with the contracts which included the plans.

Furthermore, the engineer could not alter the plans or specifications which clearly showed the correct excavation site by his informal conversation with the respondent prior to the submission of a proposal and the execution of the contract.

If the informal pointing out of objects on the surface of the water is a sufficient designation of the place of excavation, then there is no need for plans showing, with certainty, the exact location. This is especially true in view of the warning to bidders contained in the supplemental specifications as to the uncertainty of conditions likely to be encountered because of the displacement of the debris of old Pier No. 2 at the time it washed out. The supplemental specifications made a requirement upon

the respondent to make sufficient field measurements to determine the actual distances between piers. The Court in its opinion stated:

> "The contract provided for the relocation of Pier No. 2 at the same spot where the destroyed pier had been located."

While there is no such provision in the contract, it so happened that the plans for the construction of a new pier showed thereon a distance in feet which also approximated the location of the old pier. Further in the opinion the Court discussed the requirement for setting stakes by the engineer. However, respondent requested no stakes and no stakes were set designating the site for the excavation for Pier No. 2, upon which a judgment was made against your petitioner.

The provisions for the performance of special, extra or force account work contained in the specifications likewise were before the Court. Had the respondent, after executing the contract and beginning work, requested the setting of stakes to locate the excavation site for Pier No. 2, then in that event under the general specifications it was incumbent on the engineer to compiy with his request. The record is clear that no requests for the setting of stakes to locate the excavation site were made by the respondent at any time (Certified record, Pages 123 and 170).

Partial payment of the contract price was made to respondent on claims submitted during the course of the work. Such payment was accepted by respondent without demand for extra compensation as required in this cause.

Like public improvement contracts have been before the United States Supreme Court in the leading case of

MacArthur Brothers Company v. *United States*, 258 U. S. 6, 66 L. Ed. 433, 42 Sup. Ct. Rep. 225, in which case it was claimed that the United States had made misrepresentations in that certain of the work would be done in "dry" and a portion in the "wet" whereas it was impossible to do any of the work in "dry" and it was all done in the "wet" at a cost greatly exceeding what it would have been had it been the other way, The action was dismissed in the Court of Claims, which action was affirmed by the Supreme Court, and, in disposing of the case, held:

> "The elements which existed in each of the cited cases are absent from the case at bar. In the case at bar the government undertook a project and advertised for bids for its performance. There was no indication of the manner of performance, but there was no knowledge of impediments to performance, no misrepresentation of the conditions, exaggeration of them, nor concealment of them; nor, indeed, knowledge of them. To hold the government liable under such circumstances would make it insurer of the uniformity of all work, and place upon it responsibility for all of the conditions which a contractor might encounter, and make the cost of its projects always an unknown quantity. It is hardly necessary to say that the cost of a project often determines for or against its undertaking.
>
> "Judgment affirmed."

The rule laid down in the MacArthur Brothers case has been adhered to and followed by the Supreme Court of Kansas in the case of *Scherrer* v. *State Highway Comm.*, *supra*.

The opinion of the Court of Appeals, Tenth Circuit, is in conflict with the decision of the Court of Appeals, Second Circuit, rendered in the case of *Middle West Const.* v. *Metropolitan Dist.*, 133 F. 2d 468, 2nd Cir. The facts in

the Second Circuit case are that a sewer contract between the parties was completed and payment therefor made at the prices listed in the contract from which was deducted an amount for liquidated damages for delay in completion. The contractor thereafter claimed additional compensation asserting that a certain type of construction was "extra" because of the manner in which the work must be performed, the details of which are set forth in the opinion. The contractor also made claim for extra compensation for removing certain underground structures and asserted that such were not indicated on the plans. The contentions made in the foregoing case from the Second Circuit are substantially the same as those urged by the respondent herein.

The Second Circuit, in passing upon the contentions of the contractor with respect to the right to recover extra compensation, held:

> "No claim in writing was made when the work was being done. The contractor cannot fairly contend that the work constitutes extras under the contract without complying with the contract provisions as to extras. The claim involves only work covered by the terms of the contract."

The Second Circuit, in its opinion on the right to recover outside of the contract in the absence of a finding of fraud, misrepresentation or misleading, held:

> "The contention that, if the plaintiff cannot recover under the contract, it should be allowed recovery 'outside of the contract' cannot be sustained on the record. There was no fraud, misrepresentation or misleading by the defendant in the plans and specifications upon which the contract was based."

The opinion of the Court of Appeals, Tenth Circuit, is likewise in conflict with the Court of Appeals, Fifth

Circuit, as determined in the case of *Highway Const. Co. of Ohio* v. *City of Miami, Fla.*, 5th Cir., 126 F. 2d 777. In that case a contractor claimed the right to "extra work" where no order for extra work was made by the engineer in writing, which is the fact situation in the case at bar. In disposing of this matter, the Fifth Circuit stated as follows:

> "It is further without dispute that as the work progressed under the seven contracts the engineer made monthly estimates of work done and materials furnished and the Construction Company was paid ninety per cent of his estimates. For more than six months the Construction Company each month received this ninety per cent payment for work done, materials furnished, and extra work. Its officers in charge of the projects made no complaint, submitted no claim, and disputed no estimate until more than three months after the work had been completed, and after the final report had been published by the engineer. It then came forward and made large additional claims. Under the theory now presented, the contractor held back each month claims in excess of $50,000 and accepted ninety per cent of the money on estimates of the engineer for work, materials, and extras, and this in the very teeth of the contracts which provide that claims be made known on or before the 25th of each month—the engineer's estimate day. This conduct of the Construction Company does not add up to open and fair dealings."

In the present case the respondent under the provisions of the contract was entitled to partial payment upon estimates of completion. Almost monthly the respondent submitted sworn claims to your petitioner based upon such estimates. The first and last of such verified claims submitted by respondent are shown in the certified transcript of the record at Pages 241 and 245. The respondent during this period of time made no claim for extra compensa-

tion in the nature of the claim upon which the complaint in this action is based. The claims submitted by the respondent and allowed by the petitioner were accepted. Several months after the completion of the work, the claim now involved in this action was filed by the respondent and denied by your petitioner.

IV.

The Court of Appeals in Affirming the Judgment of the District Court Has Departed from the Accepted and Usual Course of Procedure in the Introduction of Documentary Evidence in the Nature of Summaries of Voluminous Records and Documents Without the Supporting Records and Documents Being Before the Court, or in the Jurisdiction, or Available for Inspection by Court or Counsel Before, During or After the Trial.

Shortly after the filing of the complaint your petitioner moved and secured an order of the District Court requiring the respondent to produce and lodge with the clerk certain documents, viz., (a) the respondent's Weekly Progress Reports from August 8, 1946 to April 9, 1948; (b) respondent's payroll records for the same period; and (c) photographs taken at the site. The respondent in response to such order lodged the foregoing items with the clerk. No other orders for the production of books, records or documents were entered and the respondent did not voluntarily lodge with the clerk any other of its records, papers or documents connected with the subject of this litigation.

The question of determining the amount of damages was referred to a Special Master.

The trial on the amount of damages came on for hearing, at which time the respondent offered the testimony of

two of its auditors and accountants. Their testimony appears at Pages 210 to 224, inclusive, of the transcript of the record filed herein. Such auditors and accountants produced summaries which had been compiled from cash disbursement books, journal books, regular books of the company, cost sheets maintained on the job, invoices, check registers, check stubs and "such other sources of information reflecting the amounts paid for the different items and from the duplicate payroll records." It must be pointed out here that none of the books, records, papers or other sources of information, except the general ledger and cost sheets had been produced or offered in evidence or made available to the Court or counsel prior to the offer of such summaries in evidence. The general payroll records of of the company had been lodged with the clerk under the order above-mentioned but misplaced while in the custody of the clerk. Respondent admitted duplicate payroll records were in its possession but were not produced or offered. The entire evidence to support respondent's proof of damages consisted of the summaries of the mass of records, papers and documents then in the possession of the respondent in its Chicago office. Your petitioner repeatedly objected to the offer of such summaries for the reason that they had been compiled from the journals, cash books and other records in the possession of the respondent and not the best evidence; and that such summaries were compiled by the witness and not subject to examination under the jurisdiction of the Court; and for the further reason that they were allocations of percentages without a showing as to the basis upon which allocations were made; and on the further ground that the witness was the judge of what should be included and what should be excluded from the compilation of the summaries and invading the province of the Court; and for the further reason that the books, records and papers themselves

should be presented, which repeated objections were disallowed by the Special Master.

The opinion of the Court of Appeals is based on the erroneous assumption that your petitioner had the opportunity to inspect such records.

The first information or knowledge of the type of proof respondent intended to offer was at the time of the opening of the trial before the Special Master. Your petitioner had assumed that respondent would offer competent evidence in proof of its claim for damages and had no reason to assume that it would be confronted with summaries prepared in advance outside the jurisdiction of the Court and the basic supporting books of account, papers, documents and other evidence would not be offered in support thereof. If such rule of evidence is sustained, it will constitute a complete departure from the already well established rules relating to the admission of summaries of the contents of voluminous records.

The Federal Courts have on numerous occasions ruled upon the question of the introduction of summaries of voluminous records and have uniformly held that before such summaries are admissible that the mass of material supporting such summaries must be produced or made available. The production of books, records, papers and documents is a prerequisite to the admission of testimony construing the entries made therein.

This rule was again reviewed in the case of *Berthold-Jennings Lumber Co.* v. *St. Louis, I. M. & S. Ry. Co.*, 80 F. 2d 32, 8th Cir. This case denied the preferential payment of certain claims for overcharges made by a carrier in intrastate commerce, but were allowed as general claims. Certain of the basic records had been destroyed and appellants had offered summaries of the voluminous records

prepared by an expert. In passing upon the question the Eighth Circuit, in its opinion, stated (l. c. 44):

> "The ledgers of certain grain commission firms were shown to have been destroyed. Before their destruction, an accountant copied off a portion of the record entries respecting the cars in which he was interested, but failed to make a complete copy. In many instances a complete copy would have shown whether an interstate shipment was involved. Appellants contend that these copies were competent as a summary of voluminous records made by an expert. There is no basis for this contention. The books that had been destroyed were not the books of the carrier. They, of course, were not produced, but neither was there any evidence that would have made them competent if the originals had been produced. While, under certain limitations, an expert may give a summary of his examination of voluminous records, if proper foundation has been laid with reference to such records so as to make them competent evidence, still to be admissible the records must at least be produced and be made available to the opposite party for the purpose of cross-examination. Ordinarily, the rule is one of convenience which goes no further than to permit a summary of the mass of records otherwise in evidence, or at least admissible in evidence and actually produced in court. *Lemon* v. *United States*, (C. C. A. 8) 164 Fed. 953; *Davis* v. *Supreme Council of Royal Arcanum*, 195 Mass. 402, 81 N. E. 294, 10 L. R. A. (N. S.) 722, 723, 11 Ann. Cas. 777; *Dohmen Co.* v. *Niagara Fire Ins. Co.*, 96 Wis. 38, 71 N. W. 69; *Stolz* v. *Scott*, 28 Idaho 417, 154 Pac. 982; Wigmore (2d Ed.), Par. 1230; Jones on Evidence (2d Ed.), Vol. 2, p. 767. The proffered testimony was clearly hearsay and incompetent."

Another case involving the introduction of summaries of voluminous records is that of *Chicago Board of Trade* v. *United States*, 223 F. 2d 348, District of Columbia Circuit.

There the Court held that a summary of certain cost figures prepared by an expert for Western Union in summary form was admissible and competent evidence by reason of the fact that all of the underlying material was assembled at Western Union's New York office. At the end of the first day's hearing, a recess of two months was ordered by the trial court to enable opposing counsel and its experts to examine the material and check the accuracy of the proposed exhibits. The Court held that inasmuch as opposing counsel had been given two months' time to examine the original records and prepare for their cross examination, the summaries were proper and competent evidence.

In a prosecution under the Criminal Code of the United States a like ruling is announced in the case of *Greenbaum v. United States*, 80 F. 2d 113, 121, 9th Cir. The reasons for the exclusion of the summaries pointed out in that case are equally applicable to the present cause. In passing upon this question the Ninth Circuit stated:

> "On the other hand, such intricacy and extent of detailed figures, massed in evidence against an accused man, place him in a perilous position. Experts differ on theories of accounting; they are not unknown to assume the functions of advocacy instead of detached analysis or statement; nor are they always free from error and mistake of fact and figuring as well as in theory. This implies no reflection on the expert in this case, but the human factor in experts' testimony requires that they shall not be permitted to bring into the case statements of their conclusions as to books not available for the purpose of cross examining the experts as to such conclusions. Courts generally, and this court in particular, have been careful to lay down the protective requirements necessary to minimize the risk to the accused arising from such opinions of experts. In an opinion of Judge Rudkin, the court has

stated the rule to be, where books of account are offered as evidence against one not a party chargeable with an interest in their keeping, that: 'In order to lay the foundation for the admission of such evidence it must be shown that * * * the entries (in the books) were either original entries or the first permanent entries of the transactions.' *Osborne* v. *United States*, (C. C. A.) 17 F. 2d 246, 248, certiorari denied 274 U. S. 751, 47 S. Ct. 765, 71 L. Ed. 1332."

The foregoing rule is likewise the law of the State of Kansas. See *Clark* v. *Moffett*, 136 Kan. 711, 18 P. 2d 555, and *Cornner* v. *Kloehr*, 144 Kan. 588, 61 P. 2d 1346. Each of these cases holds that summaries of voluminous books and records may be testified to, conditionally admitted in evidence and may be considered advisory and informative, provided the proper foundation has been laid by having the original books and records themselves in court and available to the opponent for inspection, verification and cross-examination.

CONCLUSION OF ARGUMENT.

The respondent in this case contracted to perform the complete rebuilding of the bridge in question for the sum of $326,719.66 and proposed as a part of such reconstruction the excavation for a new pier (No. 2) for the sum of $53,400.00. The opinion of the Court of Appeals in this action has sustained the recovery of $136,656.47 damages allegedly because of a mistake in the location of the site for the excavation for such pier. The respondent in this case had already been paid 90% of the price proposed for the excavation of Pier No. 2, being approximately $48,060.00. It seems incredible that the respondent herein should now be allowed a recovery of $136,656.47, or approximately 40% of the total contract

price in addition to the $48,060.00 already paid for the same work under the provisions of the contract.

The allowance sustained by the Court of Appeals was clearly outside the provisions of the contract. Therefore without a showing of deceit, fraud, bad faith or misrepresentation, the respondent is not entitled to a recovery outside of the provisions of the contract according to the holdings in the various cases hereinbefore cited.

The manner of proof permitted by the Special Master and affirmed by the Court of Appeals in its opinion in the admission of summaries of voluminous records without the supporting papers, records, accounts and documents no doubt influenced the allowance of such an exaggerated judgment. The summaries received in evidence upon which the judgment is based were compiled by the respondent's own auditors and accountants, thereby permitting such auditors and accountants to be the sole judge of what items were to be included in or excluded from the total figure upon which respondent's demand for a judgment is based.

Your petitioner therefore respectfully suggests that the affirmance of the District Court's judgment by the Court of Appeals in the admission of summaries in evidence is a departure from the usual course of judicial proceedings not to be sanctioned. Your petitioner further respectfully suggests that this petition for a writ of certiorari to the Court of Appeals, Tenth Circuit, be granted in accordance with the provisions of the law and rules of this Court, because the decision of the Court of Appeals in this action is in conflict with the decision of Courts of Appeal of other circuits on the same matter, as heretofore pointed out, and in conflict with the established general law on this matter as decided by the Supreme Court

of the United States and by the Supreme Court of the State of Kansas.

Wherefore, your petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the Tenth Circuit in the above entitled cause.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS.
TENTH CIRCUIT.

November Term, 1955.

THE BOARD OF COUNTY COMMISSIONERS OF WYANDOTTE COUNTY, KANSAS,
Appellant,

vs.

WILLIAM J. HOWARD, INC., a Corporation Organized under the Laws of the State of Illinois,
Appellee.

No. 5189.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.

J. E. Schroeder and Harold H. Harding for Appellant;

T. F. Railsback and Eugene P. Kealy for Appellee.

Before BRATTON, Chief Judge, HUXMAN and MURRAH, United States Circuit Judges.

HUXMAN, Circuit Judge.

This was an action in the United States District Court for the District of Kansas by appellee William J. Howard, Inc., herein called the contractor, against the Board of County Commissioners of Wyandotte County, Kansas,

herein called the county, to recover the sum of $16,671.97 under Count One of the complaint and the sum of $163,-087.66 under Count Two thereof, together with interest and costs. A jury was waived and the trial was had to the court. At the conclusion thereof, the court determined that the contractor was entitled to recover but because of the complicated and extensive character of the transactions appointed a master with directions to determine the amount of recovery, make findings and submit his report to the court. This was done and the master filed his report and findings, determining the amount of recovery to which the contractor was entitled. The trial court considered the master's report, made its own findings of fact and conclusions of law and based thereon entered judgment for the contractor for $16,671.97 on the First Count and $136,-656.47 on the Second Count and for costs, including the fees and expenses of the special master.

The controversy arose out of a contract between the county and the contractor for the partial rebuilding of a bridge over the Kansas River in Kansas City, Kansas, which had been seriously damaged by flood waters. Since the controversy centers entirely around the reconstruction of Pier No. 2 in the bed of the river which had been completely destroyed by the flood, it is not necessary to set out all the items of work in the contract for the performance of which the contractor obligated itself. Neither is it necessary to set out the entire contract price for the work the contractor was required to perform. It is without dispute that all of the contract price except the sum $16,671.97, for which the contractor sought recovery in Count One, was paid. The amount of $163,087.66 which the contractor sought to recover under the Second Count was for additional expenditures and loss of reasonable profits thereon occasioned by the alleged breach of the county's obligation under the contract.

So far as the questions presented are concerned, it is sufficient to say that the contractor was required to reconstruct, in fact to rebuild, a new pier in the place of old Pier No. 2, which had been destroyed. The contract consists of a formal writing to which is attached the proposals of the contractor and numerous supplemental specifications relating to the various details of the construction, among which were drawings showing in a general way the location of the pier to be reconstructed.

The contractor contends that it was the county's duty through its engineer to set the stakes to determine the center line of all piers. The county on the other hand contends that the contractor was furnished with adequate plans and specifications showing exactly the distances between all piers to be constructed; that under the contract and general and supplemental specifications it was the obligation and duty of the contractor to determine where the new pier was to go; and that notwithstanding its engineer pointed out the spot where the new pier was to go, the contractor was nonetheless charged with determining the location of the new pier.

The contract provided for the relocation of Pier No. 2 at the same point where the destroyed pier had been located. Prior to beginning work a representative of the contractor and the engineer representing the county went to the site of the bridge where the engineer pointed out to the contractor's representative the spot where part of the piling from the old Pier No. 2 showed in the river and told him the new pier should be built in the same place the old pier had been built. He pointed out the location of the pier from the old sheet piling and the ripples of the water which could be seen, and told him, "The new pier goes where you see the old pier there, restricting the use of the word location to the exact limited area that the

pier covered." Rebuilding of new Pier No. 2 was begun at such point.

After a great deal of time and effort had been expended at this location, it was discovered that it was not the point where Pier No. 2 must be located. It was approximately 28 feet from such point. Work there was discontinued and work was begun and prosecuted to completion at the corrected location. The entire controversy centers around who was chargeable with this error.

The trial court found that it was the duty of the county to furnish the correct site for the work and to determine the correct center line of the pier.

The contract made the standard specifications of the Highway Commission, as modified by a set of printed supplemental specifications, a part of the contract. Section 5.6 of the standard specifications of the Highway Department provides that "In case of bridges, if requested by the Contractor the Engineer shall set stakes determining the center-lines of all piers, pedestals or abutments, * * *. The Contractor shall construct the work in accordance with the Engineer's stakes and marks, * * *." This is the specification upon which the contractor relies. It takes the position that when the engineer pointed out the spot where the new pier was to be constructed it was duty bound to comply with such designation. The county on the other hand takes the position that this general specification has no application because it is in conflict with and therefore superseded by Section 1 of the supplemental specifications.

Section 1 of the supplemental specifications is entitled "Scope of Work." In general it delineates the nature and the scope of work to be performed in repairing this bridge. It places upon the contractor the responsibility of making

field measurements to determine "definitely the actual distances between piers and the actual dimensions of the other parts of the existing structure to be left in place in order to fit accurately the new work to the old." We think the purpose of this specification was to place upon the contractor the responsibility of seeing that replacement parts were cut to fit.

Section 5 of the general specifications has no reference to the scope of the work. It is entitled "Control of Work," and Section 5.6 states specifically that the "Contractor shall construct the work in accordance with the Engineer's stakes and marks, * * *." We think it is clear that where the engineer is required to set the stakes and does so the contractor must do the work at such point. We think an analysis of the specifications and the testimony with respect thereto sustains the court's finding that it was the duty of the county to designate the location of the new pier.

The difficulty was that the engineer erroneously determined that the point where the superstructure of old Pier No. 2 was visible was the place of the old pier and marked it as the place where the new pier should go. This was the county's error and not that of the contractor, and the court correctly concluded that the contractor was entitled to recover for the additional work caused by this error plus a reasonable profit thereon.

Appellant cites a number of cases holding that an error by the engineer of the municipality does not relieve the contractor from complying with the specifications of the contract. Among these is the case of *Wilson* v. *City of St. Joseph*, 102 S. W. 600. In that case was involved a contract to grade a street by filling in with earth. The city engineer set a stake erroneously designating the height to

which the street was to be filled. It was held and correctly so that the contractor was not thereby relieved from the duty of filling the street to the height designated in the specifications. What the engineer by his error in effect did was to change the specifications and this he could not do. The contract specifically set out the height to which the street was to be filled and the contractor was bound to take note thereof and fill the street to that height. Other cases are cited which we have read but which in the interest of brevity we do not analyze in detail in this opinion. It is sufficient to say that in our view they are distinguishable upon their facts.

It is also urged that the court erred in allocating items of cost such as labor, overhead, use of equipment and rental of equipment during such periods of time as no work was being done on the job. Apparently there was a period of approximately nine months when no work or at least very little work was done on this job. Yet, to illustrate, the contractor continued to charge the job for the wages of the laborers the same as if they had been working on the job and also for the use of his own equipment and equipment which he had rented. Because of the error by the engineer in fixing the location of Pier No. 2, delay in prosecuting the work at the correct site occurred. Thereafter, due to winter and other climatic conditions, it was impossible to continue with the work. On account of war conditions, labor and heavy equipment were in short supply. Had the rental equipment been released and the contractor's own equipment removed to other jobs, it would not have been available when needed and, had the laborers been released, they would have gone to other jobs and could not have been reassembled when work was resumed. This would have made the performance of the

contract impossible or at best long delayed. Under these circumstances the items were properly charged to the job.

Complaint is made that the exhibits offered to prove these items were inadmissible because not supported by adequate basic data. It is sufficient to say that we do not share this view. It is contended that the court and the master erred in permitting the contractor's auditor to testify from numerous abstracts and schedules purportedly showing the total cost of the additional work and in admitting such exhibits in evidence over objection, when the original records were neither offered in evidence nor made available to the county for inspection.

There is no dispute as to the law relating to the admission in evidence of summaries of voluminous records. It may be simply stated to be that most courts require as a condition that the mass of data shall, if the occasion seems to require it, be placed at hand in court or at least be made accessible to the opposing party.[1] It seems without dispute that at the beginning of the litigation the county obtained an order upon motion requiring the contractor to lodge with the clerk of the court all of its daily reports, all of its original payroll records, all of the photographs taken from day to day and other permanent records of the contractor. Apparently this order was complied with to the satisfaction of the county because the record is silent with respect to any complaint that the contractor had not complied therewith. The master's report states that "* * * Plaintiff promptly complied with this order and lodged all of said documentary evidence with the Clerk, taking an itemized receipt from the Clerk therefor." It also appears from the master's report that all of these records

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[1]Wigmore on Evidence, Vol. IV, Par. 1230; *Berthold-Jennings Lumber Co. v. St. Louis, I. M. & S. Ry. Co.*, 80 F. 2d 32.

were removed from court by the county's attorney for examination and inspection, that all of them except the payroll records were returned to court, were present at the hearing before the master and were introduced in evidence.

Apparently the county's attorney never returned the payroll records to the clerk, at least there is no record that he did so. It is without dispute that these records were lost and were not available at the time of trial. In view of the fact the county admittedly had access to all of these records and presumably inspected and examined them, the court committed no reversible error in not requiring the contractor at the time of trial to send to Chicago for duplicate records, especially where no attempt was made to impeach the correctness of the summaries made from such records and introduced in evidence. It is not clear from the record whether the other exhibits to which objection was made were the records themselves which the contractor filed in court pursuant to the order of the court or summaries thereof, nor is it material. If they were the records themselves they were admissible because no objection was lodged with the court that they did not constitute a compliance with the court's order for production of records. If on the other hand the exhibits were summaries of such records then in court, then the supporting data for these exhibits was present in court.

Minor contentions are presented dealing with the assertion that several different claims and theories were advanced by the contractor and that in any event the contractor was entitled to no recovery on Count One. The relevancy of these contentions is not clear. In any event we do not think they require a detailed discussion. As is apparent from what has been said, it is our view that the trial court correctly concluded that both counts stated a cause of action, entitling the contractor to recovery; that no reversible error occurred during the trial; and that the finding as to the amount of damages is sustained by the record.

AFFIRMED.

CERTIFIED TRANSCRIPT OF THE RECORD,
PAGES 9, 10, 11, 12 AND 13.

SUPPLEMENTAL SPECIFICATIONS.

General Provisions.

1. Intent of the Contract Documents. The contract documents are complementary, and what is called for by any one shall be as binding as if called for by all. The intention of the contract documents is to include in the contract price the cost of all labor and materials, water, fuel, tools, plant, equipment, light, transportation and all other expense as may be necessary for the proper execution of the work.

The Standard Specifications are intended for use in obtaining a uniform standard of workmanship on all road and bridge construction in the State of Kansas. To cover such conditions as are peculiar to the Rebuilding of 12th Street Bridge these Supplemental Specifications are written and shall govern when they conflict with the requirements of the Standard Specifications. The following portions of the Standard Specifications are superseded by these Supplemental Specifications: Articles 2.7, 2.8, 2.11, 3.3, 3.5, 8.6 and Section 71.

* * * * *

4. Payments. * * * The Contractor shall accept the compensation provided for in the contract as full payment for furnishing all materials, labor, tools, and equipment, and for assuming all risks connected with and for performing all the work contemplated and embraced under the contract; also for all loss or damage arising from the nature of the work, or due to the action of the elements;

for all expenses incurred by, or in consequence of the suspension or discontinuance of the said prosecution of the work as herein specified; for all loss caused by *unforseen* difficulties or obstructions which may arise or be encountered during the prosecution of the work until its final acceptance by the Engineer.

* * * * *

13. Completion Date and Construction Schedule. The Contractor shall commence work under this contract within ten (10) days after receiving a written order from the Engineer to proceed with the work and shall fully complete all work hereunder within three hundred (300) calendar days from the date of such notice to proceed.

14. Liquidated Damages. It is understood that the contract price agreed upon is based on completion of the work to the satisfaction of the Engineer within the time stipulated, and the Contractor agrees that in case of his failure to complete the work within the contract time or within the time to which the time for completion may be extended, the Contractor shall pay the Owner the sum of Thirty-five Dollars ($35.00) for each and every calendar day thereafter, including Sundays and Holidays, that elapses before said work is completed in accordance with the terms of the contract.

It is agreed by the Contractor and the Owner that the above sum is a fair and reasonable compensation for the damages sustained by the Owner for failure by the Contractor to complete the work within the time set forth in the proposal, and payment of such sum by the Contractor will not in any way constitute the infliction upon him of a penalty.

* * * * *

SUPPLEMENTAL SPECIFICATIONS.

Special Provisions.

1. Scope of Work. The work consists of furnishing all of the materials, equipment, labor, superintendence, insurance, transportation, fuel, tools and plant necessary to carry out the complete reconstruction of the substructure and superstructure of the 12th Street bridge as set out in these contract documents. This work consists in general of the rebuilding of Pier 2, the removal and rebuilding of Pier 3, rebuilding of approximately seventeen (17) panels of a three span deck truss bridge of the cantilever type, having a reinforced concrete roadway slab of 22'-0" clear width and a five foot sidewalk. The 13 panels of the deck truss span, now remaining in place are to be temporarily supported on falsework during the removal and reconstruction of Pier 3. The work also includes moving the existing 118' through girder span about 3/4" to the South, repairs to the existing structure to place it in usable condition and the cleaning and painting of all structural steel in the existing structure.

The Contractor must assume full responsibility for successfully carrying out the complete construction and for the fit of all members. Plans showing the details of the existing structure may be inspected at the office of the County Engineer of Wyandotte County, Kansas, but the Contractor must make sufficient field measurements to determine definitely the actual distances between piers and the actual dimensions of the other parts of the existing structure to be left in place in order to fit accurately the new work to the old.

* * * * *

7. Alterations to Substructure. A new Pier 2 will be constructed to replace the pier that was washed out. Existing Pier 3 will be removed and a new pier constructed in its place. The existing Pier 1 will be repaired to accommodate the reconstructed superstructure.

• • • • •

The owner has removed portions of the debris from Pier 2. Foundation piles and steel sheet piles remain in place except as they may have been displaced at the time the pier was washed out. It is not guaranteed that all debris has been removed and the Contractor shall make his own determination of the amount of debris, piling, etc. which it will be necessary for him to remove in building his cofferdam and excavating at Pier 2 and include the costs of this removal in the contract *unti* price for "Excavation for Piers."

• • • • •

Payment. The quantities to be paid for at the contract unit prices for "Excavation for Pier 2" and "Excavation for Pier 3" will be determined for each pier as that volume contained within vertical planes as shown on the Plans, and horizontal planes, the upper one of which is at elevation 722.9 and the lower one at the elevation of the bottom of the concrete seal course as shown on the Plans or as directed by the Engineer in writing, without regard to the actual elevation of the ground, water surface, or other materials to be excavated at the time excavation is started.

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CERTIFIED TRANSCRIPT OF THE RECORD,
PAGES 186 TO 188.

STANDARD SPECIFICATIONS FOR STATE ROAD AND BRIDGE CONSTRUCTION, EDITION 1945.

* * * * *

Section 4.

Scope of Work.

4.1 Intent of the Plans and Specifications—The intent of the plans and these specifications is to provide for the execution and completion in every detail of the work described herein, and it is understood that the Contractor for all or any part will furnish all labor, material, equipment, tools, transportation and necessary supplies, such as may be required to execute the contract in a satisfactory and workmanlike manner and in accordance with the plans, specifications and terms of the contract.

4.2 Special Work—Special work refers to that part of the work which is not satisfactorily covered by the Standard Specifications and for which supplemental specifications have been prepared. Such work shall be considered a part of the contract and should the supplemental specifications conflict with the Standard Specifications the supplemental specifications shall govern.

* * * * *

4.4 Extra Work—Work made necessary by alteration of plans, or by other reasons, or additional work necessary to complete the proposed improvement, for which work no price or compensation is provided in the contract, shall be deemed extra work. Such work shall be performed by the Contractor under the direction of the Engineer in accordance with the Specifications. Extra work shall not be started before a Supplemental Agreement has

been executed between the Contractor and the Commission stipulating that the work shall be paid for at the stated unit price or lump sum; or failing such agreement the Engineer shall give the Contractor a written order stipulating that the work shall be done on force account basis.

* * * * *

Section 5.

Control of Work.

* * * * *

5.4 Coordination of Plans and Specifications—The specifications, accompanying plans, special provisions and all supplementary documents are essential parts of the contract and a requirement appearing in one is as binding as though it appeared in all. They are intended to be cooperative, to describe and provide for complete work.

In the event of any discrepancy between the drawings and the figures written on the drawings, the figures are to govern, and in case of any discrepancy between the drawings and the Specifications, the Specifications are to govern. If there is a discrepancy between the Standard Specifications and the Supplemental Specifications, the Supplemental Specifications are to govern.

The Contractor shall take no advantage of any apparent error or omission in the Plans or Specifications. It shall be the duty of the Engineer to make such corrections and interpretations as may be deemed necessary for the fulfillment of the intent of the Plans and Specifications.

* * * * *

5.6 Construction Stakes—The Engineer will furnish and set construction stakes establishing lines and profile grades in roadwork, and roadway and waterway center-

lines and bench marks for bridge work, and will furnish the Contractor with all necessary information relating to lines and grades. In case of bridges, if requested by the Contractor, the Engineer shall set stakes determining the centerlines of all piers, pedestals or abutments, together with stakes determining the angles of the wings or retaining walls. The Contractor shall furnish, free of charge, all templets and other materials necessary for establishing and maintaining points and lines given. The Contractor shall construct the work in accordance with the Engineer's stakes and marks, and shall be charged with full responsibility for conformity and agreement of the work with such stakes and marks. The Contractor shall be held responsible for the preservation of all stakes and marks and if, in the opinion of the Engineer, any of the stakes or marks have been carelessly or willfully destroyed or disturbed by the Contractor, the cost of replacing them shall be charged against the Contractor and shall be deducted from the payment for the work.

* * * * *

5.10. Removal of Unauthorized or Defective Work.—Any defective work, whether the result of poor workmanship, use of defective materials, damage through carelessness or any other cause, found to exist prior to acceptance of final payment for work, shall be removed immediately and replaced by work and materials which shall conform to the specifications or shall be remedied otherwise in an acceptable manner authorized by the Engineer. This clause shall have full effect regardless of the fact that the defective work may have been done or the defective materials used with the full knowledge of the inspector. The fact that the inspector in charge may have previously overlooked such defective work shall not constitute an acceptance of any part of it.

No work shall be done without lines and grades having been given by the Engineer. Work done contrary to or regardless of the instructions of the Engineer, work done beyond the lines shown on the plans, or as given, except as herein specified, or any extra work done without authority will be considered as unauthorized and will not be paid for under the provisions of the contract. Work so done may be ordered removed or replaced at the Contractor's expense.

CERTIFIED TRANSCRIPT OF THE RECORD, PAGE 190.

* * * * *

9.5 Special, Extra, or Force Account Work—In no case will any claim for extra work be allowed unless same has been ordered in writing by the Engineer. The Contractor shall perform special or extra work, for which there is no price included in the contract, whenever to complete fully the work as contemplated it is deemed necessary and desirable that such work shall be done. Such special or extra work shall be done in accordance with the specifications therefor. This special or extra work will be paid for at a unit price or lump sum to be agreed upon previously in writing by the parties hereto. If such a price or sum cannot be agreed upon by both parties, or if this method of payment is impracticable, the Engineer, with the approval of the Commission, may order the Contractor to do such work on a force account basis, or other arrangement may be made for doing the special or extra work.

FILED
APR 21 1956
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 839

THE BOARD OF COUNTY COMMISSIONERS OF WYANDOTTE COUNTY, KANSAS,

Petitioner,

vs.

WILLIAM J. HOWARD, INC., A CORPORATION ORGANIZED UNDER THE LAWS OF THE STATE OF ILLINOIS,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 839.

THE BOARD OF COUNTY COMMISSIONERS OF WYANDOTTE COUNTY, KANSAS,

Petitioner,

vs.

WILLIAM J. HOWARD, INC., A CORPORATION ORGANIZED UNDER THE LAWS OF THE STATE OF ILLINOIS,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

To the Honorable, The Chief Justice of the United States, and The Associate Justices of the Supreme Court of the United States:

OPINION BELOW.

Petitioner on page 2 states that the District Judge wrote no opinion in this case. The learned Judge of the District Court, to whom this case was tried without a jury, made definite findings of fact and separate conclusions of law shown in the record at page 47 *et seq.* The Special Master appointed by the Court to hear evidence of damages also made findings of fact. (Rec. p. 23, *et seq.*) The District Court did not incorporate these findings as such but made separate findings of fact.

For further convenience of the Court the findings of fact and conclusions of law by the District Court are printed and added as an appendix hereto.

QUESTIONS PRESENTED FOR REVIEW.

None of the three (3) questions presented in the petition for certiorari come within the specific reasons stated in Rule 19 of this Court as indicating the character of reasons for granting a writ of certiorari.

Rule 19 (a) has no application because this case was not decided by a state court.

Rule 19 (b) has no application because the decision of the Court of Appeals is not in conflict with the decision of another Court of Appeals on the same matter.

The issues presented to the District Court and the Court of Appeals did not require a decision on any important state or territorial question, nor any important question of federal law, nor decided any questions of federal law, nor has decided a federal question in a way in conflict with applicable decisions of this Court.

Nor has the District Court or Appeals Court departed from the accepted and usual course of judicial proceedings.

This case is one of factual character involving local questions of no important significance and would never have reached a federal court except by reason of diversity of citizenship.

STATEMENT.

The petitioner's statement of facts is incomplete and argumentative.

Petitioner's statement of the case in the first paragraph on page 3, erroneously states that this is an action to recover damages and this thought seems to follow through the entire statement. Definitely this is not an action *ex delicto*.

The learned Judge of the District Court in his conclusions of law No. 3 (Rec. p. 51), said, "The action sounds in contract and not in tort * * *."

The complaint (Rec. p. 2, *et seq.*) recites that the plaintiff and defendant entered into a construction contract and the defendant, through its engineers, made a mistake and committed an error in locating the place where Pier 2 was to be built and because of that mistake, which persisted without correction for many months, the plaintiff performed labor and paid out money in the aggregate amount of $163,087.66, which it was entitled to collect back from the defendant. Consequently, it is not an action to recover damages.

The Judge of the District Court made findings of fact shown in the record at page 47, *et seq.*, among others, finding of fact No. 2 in which the Court found:

> "2. The Court finds from the evidence, that the old Pier No. 2 had moved from its original location; that under the terms of the contract the defendant was required to furnish the correct site for the work, and determine the correct center line of said pier, and it failed to do so, but directed work to be done at another site, and allowed work to be done at the other site for about sixteen months; and during this time approved estimates for work done by plaintiff upon which plaintiff received payments from the defendant; that when the error was discovered, defendant's engineers directed work to be done by plaintiff at a new location,

which plaintiff did and completed Pier No. 2 and the bridge; that the defendant refused to pay plaintiff for work done under the contract at the correct site of Pier No. 2, and there is due to plaintiff therefor a sum exceeding $3,000.00. That plaintiff made timely request of the defendant's engineers for the establishment of the center line of Pier No. 2, and that defendant's engineers did not comply with that request, but did notify the plaintiff to construct Pier No. 2 at a location where the remains of the Pier No. 2 of the predecessor bridge could be seen in the surface of the water, and that such location did not represent the correct center line or any other line of Pier No. 2 to be constructed."

The trial Court further found that because of the mistakes of the County and its engineers the plaintiff laid out and expended money on various accounts in the aggregate sum of $136,658.47. (Findings of Fact, Rec. p. 49, 50, 51.)

With this observation in mind, let us proceed to a consideration of petitioner's brief.

ARGUMENT.

I.

Respondent has never claimed compensation under the headings of "extra work" or "outside the contract".

Respondent has never claimed it was the victim of fraud, misrepresentation, deceit or bad faith.

Respondent's claim is for money expended for work done pursuant to the express terms of the contract by reason of the mistakes of the County and its engineers. As previously stated above the District Court in its Findings of Fact expressly so held.

Petitioner seems to rest its argument at this point upon the provisions of the Supplemental Specifications only. The District Court found in its conclusions of law No. 7 (Rec. p. 52) that Sections 5.6 and 5.10 of the Kansas State Highway Commission—Standard Specifications for highway and bridge construction were not deleted nor superseded by the supplemental specifications and said Sections 5.6 and 5.10 remain a material part of the construction contract between the parties. The importance of Sections 5.6 and 5.10 is set out by the District Court in its conclusion of law No. 8 (Rec. p. 52) which clearly shows that the burden was upon the County and its engineers, and not that of the contractor, to determine the site of the work.

The cases cited and quoted from by petitioner are distinguishable on the facts.

In *Middle West Construction, Inc.* v. *Metropolitan District of Hartford,* 2nd Cir. 133 F. 2d 468, the claim was for extra work outside the contract on some theory that inasmuch as the contractor had underestimated in making his bid and the work was more costly than anticipated he should recover.

Such is not the present case.

In *Highway Construction Company of Ohio, Inc.* v. *City of Miami,* 5th Cir., 122 F. 2d 777, the claim was for extra work. In this case claims were not made until after completion of the work, without compliance with the express terms of the contract. This is totally unlike the present case.

Mac Arthur Brothers Company v. *United States,* 258 U. S. 6, 66 L. Ed. 433, referred to on page 10 of petitioner's brief, has become a leading case throughout the nation but is not in point to the situation here. There it was said that representations were made that certain of the work could be done in the "dry" and other work would be done in the "wet" and it became impossible to do any of the work in the "dry" and it was all done in the "wet" and it increased expenses. There was no knowledge on the part of the government of impediments in the performance, no misstatements of conditions, exaggeration of them, nor concealment of them; nor, indeed knowledge of them, and to have held the government liable would have made it an insurer.

In the present case the County and its engineers had knowledge of the terms of the contract which required them to give the contractor the center line of the pier. They had made condition surveys and then drawn their plans and knew where that center line should be. Instead of taking the time accurately to locate it and set stakes to identify it, they guessed or assumed or took for granted that the new pier would go where the wreck of the old pier was visible in the water and instructed the contractor to proceed at that location. These other cases have depended upon failure of the owner and its engineers, a negative quantity, where we alleged and proved affirmative wrong instructions.

There are a group of authorities more or less similar to the present case. We cite some of them herein.

In *City of Chicago* v. *Duffy*, 218 Ill. 242, 75 N. E. 915, the court states:

Page 243—

"This was an action of assumpsit brought by Joseph J. Duffy, against the City of Chicago, in the circuit court of Cook county, to recover a balance claimed to be due him from the city upon a written contract bearing date September 30, 1895, whereby he agreed to build section 2 of a water tunnel proposed to be constructed by the city."

Page 244—

"It is next contended that the Appellate Court erred in holding that the plaintiff was entitled to recover, at the rate of $10 per cubic yard, for 8371.08 cubic yards of back masonry made necessary by the engineers of the defendant giving improper and erroneous instructions to the servants of the plaintiff while such servants were, under their direction, blasting out said tunnel. The contract provided the work should be carried on under the direction of the city engineer. His subordinates, as the work progressed, directed the servants of plaintiff as to the line upon which the tunnel should be blasted out. When the tunnel was ready for the brick work it was discovered it did not run in a straight line. In bringing the tunnel to a proper line it had to be enlarged, which made necessary said back masonry. The Appellate Court incorporated in its judgment a finding of fact that said extra back masonry was made necessary by reason of the negligence of the defendant's engineers. We think the cost of said extra back masonry should be borne by the city. *Chicago and Great Eastern Railway Co.* v. *Vosburgh*, 45 Ill. 311; *Sexton* v. *City of Chicago*, 107 *id.* 323.

The case of *City of Wheeling* v. *John F. Casey Co.*, Circuit Court of Appeals, 4th Circuit, 74 F. (2d) 794, is quite in point.

This was an action at law in assumpsit by the contractor, a Pennsylvania corporation, against the City of Wheeling,

West Virginia, in the United States District Court for Northern District of West Virginia based on a contract for the construction of a filtration plant which was designed, plans produced and supervised by the city engineers, resident and hired. The resident engineer of the city engineers in laying out the main line of the project mistakenly located the line 21.9 feet to the west of the proper line. Before the contractor discovered the error the job was 98 per cent completed although the engineers knew of error before and did not advise the contractor. Damages of $160,000.00 were claimed for additional cost of project on mistaken rather than proper location and for additional work on a new intake line.

The city demurred to the declaration, which was overruled. Verdict for plaintiff for $75,000.00 and city appealed from judgment thereon.

The court held that the relationship between the city and its engineers was an agency instead of independent contractors, and stated (p. 796):

> "Having reached the conclusion that the engineers were the agents of the city and not independent contractors, it follows that the action in assumpsit was the proper one. The action was not primarily based upon a tort, as the original mistake of the engineer as to the location was not intentioned, and the right of the Casey Company to recover arose from the contract. *City of Chicago* v. *Duffy*, 218 Ill. 242, 75 N. E. 912; *Wyandotte & D. R. Ry.* v. *King Bridge Co.*, (C. C. A.) 100 Fed. 197; *Guerini Stone Co.* v. *P. J. Carlin Const. Co.*, 248, U. S. 334, 39 S. Ct. 102, 63 L. Ed. 275; *Wessell* v. *Montgomery*, 106 Pa. Super. 341, 106 A. 347; *Ryan* v. *City of New York*, 159 App. Div. 105, 143 N. Y. S. 974." (Page 797.)
>
> "The action being properly brought in assumpsit, the declaration was sufficient and the demurrer was properly overruled."
>
> "The Casey Company, under the circumstances es-

tablished by the evidence, is entitled to recover under the terms of the contract both express and implied." (Page 796.)

"The engineers, after approval of the plans and specifications drawn by them, directed the setting of the stakes, and it was then that the mistake that gave rise to this litigation occurred. That the mistake was not intentional seems clear, and it is contended on behalf of the city that the plaintiff, having contracted to construct the project according to the plans and specifications, should have discovered the mistake before beginning the work. On this point we agree with the judge below that the question as to whether the plaintiff in the exercise of reasonable care should have known of the mistake was one for the jury, which question the jury resolved in favor of the plaintiffs. We think the jury reached the correct solution. The engineers had drawn the plans, the contracts gave them the right to locate the plant, and the work of location was primarily the duty of an engineer placed in complete authority over the entire project and over the contractor rather than the duty of the contractor. It seems to us reasonable that the contractor should rely implicitly upon the direction of the engineer with regard to a question that was solely one of engineering". Citing *Berry* v. *Huntington Masonic Temple Association*, 80 W. Va. 342, 93 S. E. 355; *Maney* v. *Oklahoma City*, 150 Okla. 77, 300 P. 642, 76 A. L. R. 258; *Wyandotte and D. R. Ry.* v. *King Bridge Co.*, (C. C. A.) 100 F. 197; *City of Chicago* v. *Duffy*, 218 Ill. 242; 75 N. E. 912; *Henderson Bridge Co.* v. *McGrath*, 134 U. S. 260, 10 S. Ct. 730, 33 L. Ed. 934.

The above cases are cited as samples of others of like nature and to show the distinction between the principles controlling the present case applied by the District Court and the Court of Appeals and the principles of the cases cited by petitioner in Points I, II and III of its argument.

II.

Petitioner cites and quotes from certain Kansas cases as determinative of the issues involved here. Petitioner refers to the case of *City of Hutchinson* v. *White*, 80 Kan. 37. Its application is not clear and it is an ancient and forgotten case decided by the Supreme Court of Kansas in 1909, and according to Shepard it has never been cited in Kansas from that day to this. It therefore is not a milestone in the judicature of this state.

The facts there do not register upon those here. The City of Hutchinson determined to build a canal and had its City Engineer make plans and specifications therefor. It invited bids and awarded a contract to the defendant in error. One of the things provided for in the specifications was that the contractor would be required to move all earth necessary to dig the canal to the specified depths and widths, and to deposit the earth excavated on the 50-foot right-of-way on either side of the canal to a certain elevation. After the contractor had gotten into the work he discovered that there was not sufficient room on the banks of the canal to contain all of the dirt he was removing and he was put to $2,900.00 expense in putting it some place else. In the opinion, the Court through Graves, *J.*, points the issue like this:

> "The chief controversy presented here is the contention on the part of the city that the claim of the plaintiff is for extra work, the recovery of which is barred by a clause in the specifications requiring all such work to be authorized by the city in writing, which clause by adoption became a part of the contract. The contractor insists that the work was not extra work in that sense, but was work made necessary by an error in the specifications, and work which was impossible of performance under the contract.
>
> It is clear that the city engineer miscalculated the

> space necessary to receive the dirt taken from the canal. This, however, was a mere error in mathematics. The date from which the computation was made clearly appeared in the plans and specifications from which the contractor made the calculations upon which his bid necessarily depended."

Thus the error of which the contractor complained was in the specifications themselves; it was patent and obvious and ascertainable by the contractor if he could use a pencil. The Court observed that while it was clear that the city engineer miscalculated the space necessary to receive the dirt, the data from which the computation was made clearly appeared in the plans and specifications from which the contractor made the calculations upon which his bid necessarily depended. The Court said:

> "A careful contractor would have ascertained whether the fifty-foot strip reserved for the dirt excavated was sufficient or not. * * *"

That disposes of that case as an authority here. The mistake and error of which we complain was not patent and was not one on the face of the specifications or drawings, but was one made by the Engineer in the discharge of a responsibility reserved by and to him only, to designate the location of the bridge and the location of its several piers, pedestals and abutments by setting stakes to establish the center lines thereof.

Nor does the case of *Scherrer* v. *State Highway Commission*, 148 Kan. 357, seem to add any stability to Petitioner's position. In that case, the contractor, Scherrer and Bennett, sued the State Highway Commission on the theory that the plans and specifications furnished by the Commission stated there would be so many yards of rock and so many yards of earth, and that the plaintiff made a bid to excavate unclassified material on the basis of the proportions of earth and rock given in the specifications,

and that as a matter of fact it was necessary to move a substantial amount of rock over and above the amount given in the specifications.

The opinion of the Supreme Court as a whole is necessary to a full understanding here, but there are certain things therein pointed out which make it very easy to understand why the demurrer was sustained to this petition.

In the advertisement for bids, it is said, page 361:

> "Detailed information of the work to be done may be had by an examination of the plans and specifications on file in the offices of the county clerk of the county in which the work is located, or at the offices of the state highway commission."

In the plaintiff's proposal or bid appeared this declaration:

> "The undersigned further declares that he has carefully examined the plans, specifications, form of contract and special provisions, if any, and that he has inspected the actual location of the work, together with the local sources of supplies, and has satisfied himself as to all quantities and conditions, and understands that in signing this proposal he waives all rights to plead any misunderstanding regarding the same. * * * The undersigned further agrees that the quantities enumerated are not guaranteed by the commission, and with such an understanding he accepts the quantities as tentative and agrees to receive payment at the unit prices for work performed. The classification of culvert, bridge or highway excavation shown on the plans is not guaranteed and where contracts are awarded on unclassified excavation the unit price bid shall include any and all excavation encountered on the work regardless of the classification shown on the plans."

In the specifications which were a part of that contract appears the following:

"The bidder is required to examine carefully the site of the proposed work, and the proposal, plans, specifications and contract forms, for the work contemplated, and it will be assumed that the bidder has investigated and is satisfied as to the conditions to be encountered, as to the character, quality and quantities of work to be performed and materials to be furnished and as to the requirements of the specifications and contract. It is mutually agreed that submission of a proposal shall be considered conclusive evidence that the bidder has made examination."

The Kansas Supreme Court said, l. c. 363:

"When the bidder examined the plans and profiles it is to be assumed that he also examined the specifications and all the paragraphs of it. When he did so he must have seen the paragraph wherein it was provided that the submission of a proposal would be considered conclusive evidence that they had investigated the work contemplated for the very purpose of avoiding as nearly as possible the occurrence of the difficulty with which we are now confronted. At the outset this was a challenge of their attention to the necessity of making their own investigation. Having examined the plans and specifications the plaintiffs signed a proposal. This proposal, besides the statement that plaintiffs would do the work, contained a paragraph already set out in this opinion to the effect that plaintiffs had made the investigations to which reference had been made in the specifications. Plaintiffs must be presumed to have made the proposal with knowledge of the provisions of this paragraph.

Besides this paragraph, the proposal contained another that refers specifically to the situation we are considering. In it plaintiffs agreed that the quantities enumerated were not guaranteed by the commission and that they understood that they were tentative. The portion of this paragraph with which we are interested is as follows:

'The classification of culvert, bridge or highway excavation shown on the plans is not guaranteed and

where contracts are awarded on unclassified excavation the unit price bid shall include any and all excavation encountered on the work regardless of the classification shown on the plans.'

This sentence in the paragraph could apply to nothing else than the situation we are considering, that is, in view of the method of calculating the amount of a bid for unclassified excavation plaintiffs agreed to carry out whatever excavation there was to be done at the unit price bid regardless of the classification shown on the plans. As the contract was finally executed all these provisions were a part of it.

How can a contractor who examined these plans and specifications, made this proposal, and signed this contract, say he had a right to rely on the quantities named in the plans? The very nature of the type of bid called for precludes such a construction. The bid being asked to be made on unclassified excavation was notice to plaintiffs that a careful examination should be made so that the proportion of rock and earth might be known and correctly calculated."

Thus it is seen that in this particular case the contractors bid on certain unclassified excavation on a unit basis price and were disappointed because there was an error of judgment in the classification. They could not recover against the state because the state had not deceived them or misrepresented anything to them. That is not the case of an engineer making a mistake and establishing an erroneous line, and it is not a mistake in the specifications. It was the plaintiff's own mistake in failing accurately to size up the job before he undertook it.

This is similar to the case of *MacArthur* v. *United States, supra.*

These cases are similar to the cases cited by petitioner under Point I of its argument. This is shown by the last paragraph of Point II of petitioner's argument (page 14) wherein it states that the general law of Kansas is that

the parties are bound to perform under the terms of the contract and may recover only under the provisions therein contained, and not outside the contract unless it may be legally avoided by a finding of bad faith, fraud, deceit or misrepresentation amounting to a warranty.

This is the same argument as in Point I and is not applicable to the present case.

III.

Petitioner in its Point III renews and repeats the identical arguments contained in Points I and II.

Again petitioner argues that there can be no recovery against the County unless there is a showing and finding of bad faith, deceit, fraud or misrepresentation.

Respondent has shown under Points I and II of our brief that we have never claimed that the Petitioner was guilty of bad faith nor is it necessary under the law that a recovery be founded upon any such ground.

Petitioner again argues that no recovery can be had unless the contractor recovers under the provisions of the contract relating to "Special Work" and "Extra Work". These terms are not important because there is no such involvement here.

The balance of petitioner's argument under Point III is devoted to factual questions which have already been decided contrary to petitioner's contentions by the Findings of Fact entered by the District Court and affirmed by the Court of Appeals.

Petitioner again cites the case of *Middle West Const. Inc.* v. *Metropolitan Dist.*, 133 F. 2nd 468, 2nd Cir. This case was cited by Petitioner under Point I (Brief p. 10). It involves a claim for extra work outside the contract on some theory that inasmuch as the contractor had under-

estimated in making his bid and the work was more costly than anticipated he should recover.

Such is not the present case.

Petitioner again cites the case of *Highway Construction Company of Ohio, Inc.* v. *City of Miami*, 5th Cir. 122 F. 2nd, 777, having previously cited this case under Point I of its brief, page 10. This case involved a claim for extra work, which claim was not made until after completion of the work without compliance with the express terms of the contract.

This is totally unlike the present case.

IV.

In answer to Point IV of petitioner's argument concerning introduction of documentary evidence we refer to the findings of law by the trial judge (Appendix) Transcript of Record, Vol. 1, p. 53.

These findings are as follows:

> "No. 10. The payroll records of the plaintiff which were lodged with the Clerk of this Court by order of this Court were received by counsel for the defendant, as shown by the Clerk's records and receipts, but there is no record in the Clerk's office that they ever were returned to him, and the plaintiff was unable to discover the whereabouts of said payroll records at the hearing before the Special Master. Under the circumstances, secondary evidence of said payroll records was admissible.
>
> No. 11. The plaintiff's auditors had made summaries and the plaintiff itself kept a cost account of this particular job. The cost account was introduced in evidence and was admissible as an original record kept by the plaintiff. The summaries made by the plaintiff's auditors, in view of the fact that the plaintiff's ledger and cost account and all the daily reports were in evidence, were admissible in evidence but not conclusive."

We also refer to the conclusions of Law of the Special Master on this subject which appear in the Transcript of Record, Vol. 1, on page 27. These findings are as follows:

> No. 1. The payroll records of the plaintiff which were lodged with the Clerk of this Court by order of this Court were received by counsel for the defendant, as shown by the Clerk's records and receipts, but there is no record in the Clerk's office that they ever were returned to him, and the plaintiff was unable to discover the whereabouts of said payroll records at the hearing before the Special Master. Under the circumstances, secondary evidence of said payroll records was admissible.
>
> No. 2. The plaintiff's auditors had made summaries and the plaintiff itself kept a cost account of this particular job. The cost account was introduced in evidence and was admissible as an original record kept by the plaintiff. The summaries made by the plaintiff's auditors, in view of the fact that the plaintiff's ledger and cost account and all the daily reports were in evidence, were admissible in evidence as informative but not conclusive. The Master has considered the same but no evidence having been offered by the defendant in contradiction thereof and the same having been made in an orderly and intelligent manner with appropriate reference to the ledger accounts, the Special Master has considered them not only informative but has given them full consideration in arriving at the amount of the judgment which should be entered in this case.

Also the Report of the Special Master appearing on page 34, 35 and 36 of the Record, which is too long to quote but is a full explanation of the admissibility of the records and the reasons why certain original payroll records were not produced.

Petitioner again makes one of those sweeping statements which is not substantiated by the record. It says (p. 21):

> "The entire evidence to support respondent's proof

of damages consisted of the summaries of the mass of records, papers and documents then in the possession of the respondent in its Chicago office."

Petitioner has forgotton. Early in the history of this law suit and before any part of the trial was conducted, the defendant obtained an order upon a motion, requiring the plaintiff to lodge with the Clerk of this Court all of its daily reports, all of its original payroll records, all of the photographs taken from day to day, and other permanent records of the plaintiff. The record does not contain this order and the things done under it, but the Master reported (R. 34) as above set out, and further said:

"* * * the plaintiff promptly complied with this order and lodged all of said documentary evidence with the Clerk, taking an itemized receipt from the Clerk therefor."

The Master further reported (R. 34):

"It also appears from the record in this case that within a day or two after said documents were lodged with said Clerk that the then County Counselor, Mr. John K. Dear, removed all of said documents from the office of said Clerk for examination, inspection, photographing or copying, giving a similar itemized receipt to the Clerk therefor. The daily reports and photographs and all of the papers except the 112 pages of payroll records were clearly returned because they were introduced in evidence in the main case, but the payroll records were not introduced in evidence, and there is no record in the office of the Clerk or other positive evidence that they were ever returned to the Clerk's office. * * * The payroll records appear never to have been introduced in evidence in the principal case, and although Mr. Delich, Deputy Clerk at Kansas City, searched high and low for said payroll records in the Kansas City office and caused a similar search to be made in the Clerk's office at Topeka and in the Clerk's office at Wichita where they might have been sent with other papers for study by Judge Hill, all of

> these searches not only failed to reveal said missing payroll records, but likewise failed to reveal any trace of them or receipts for them, save only the receipt given the plaintiff when they were originally lodged with the Clerk, and the receipt given by Mr. John K. Dear, then County Counselor, when he took them out for examination. The fact that they were lost and missing and could not be found was made positively to appear on the record."

The Master (R. 36) held that the summaries and payrolls made from duplicate payroll records at the home office were properly admissible in evidence at least as informative if not conclusive, and made the observation,

> "Furthermore, the defendant offered no evidence to controvert the testimony produced by the plaintiff or to challenge the accuracy of the summaries produced by the plaintiff's auditors." (R. 36.)

Petitioner now complains because these original payroll records were not available for cross-examination, and in the circumstances, respondent feels that the complaint does not come with good grace. They were last seen in the company of defendant's lawyers. Be that as it may, the original daily reports, several hundred of them had been introduced in evidence in the main case and were on the Clerk's desk during the entire time this case was tried to the Master and from those which were examined in the hearing, it appears that these reports contained an accurate record of what happened on each particular day and where it happened and were original records kept by the plaintiff. The plaintiff likewise kept a cost account which was introduced in evidence and considered by the Court and used in Conclusion of Law No. 11. (R. 53.)

Rule 43 (a), of Rules of Civil Procedure for United States District Courts, relating to the form and admissibility of evidence in federal courts, provides among other things:

> "All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs. * * * "

We do not find any law or rule of the United States on the subject of admissibility of the books or records of a business concern kept in the regular order of its business. There is a statute in Kansas which reads like this, G. S. 60-2869:

> "Entries in books and other writings intended as records of sales, purchases, receipts, payments, deliveries, weights, measures, time, transactions or events, made in the regular course of business of any person, firm, corporation or public officer, as a record of the matters to which they relate, at or near the time of the transaction or occurrence, shall be admissible in evidence on proof that they were so made. * * * "

In the case of *Robertson* v. *Robertson* and *Ridenour-Bakery Grocery Co.*, 100 Kan. 133, it was said, on p. 135:

> "There was abundant evidence to show the correctness of the account of Ridenour-Baker Company. It is useless to contend that there was prejudicial error in admitting in evidence statements of a witness who testified that he was in charge of the city credits of the grocery company, and that the entries, though not made in his presence, were made under his supervision. They were entries made in the regular course of business, and were admissible under the rule of section 384 of the code (*Richolson* v. *Ferguson*, 87 Kan. 411, 124 Pac. 360; *Cockrill* v. *Railway Co.*, 90 Kan. 650, 136 Pac. 322). 'The modern notion of the admissibility of evidence is that it is more important to get the truth

than to quibble over impractical distinctions between facts and conclusions.' (*Bank* v. *Robinson*, 93 Kan. 464, Syl. No. 2, 144 Pac. 1019)."

Note: G. S. 60-2869 is reenactment of Sec. 384 of the Code of Civil Procedure of Kansas.

In *Stanley* v. *Wickam*, 122 Kan. 628, Syl. 2, it is said:

"It is not error to admit in evidence entries in a ledger shown to have been posted about thirty days after the transaction referred to, from a temporary daybook the nonproduction of which is accounted for."

Bank may introduce in evidence entries made in regular course of business. *Bank* v. *Gragg*, 98 Kan. 318, 158 Pac. 41.

Summary of books by accountants properly received where originals accessible in court, *Clark* v. *Moffett*, 136 Kan. 711, 18 P. 2d 555. In this case the Kansas Supreme Court said, at p. 715:

"Appellants complain because the court received in evidence the summary of the books made by the accountants, 'Commerce Trust Company Exhibit No. 8,' and contend that it was incompetent and hearsay, and they contend that without it the evidence was insufficient. Naturally the original books were voluminous. They had been brought to the court in large boxes and trunks. They had been in possession of the plaintiffs who had helped keep the books in recent years and were familiar with them. It was appropriate for a summary to be made by some one from them, collecting and properly setting down the entries or items bearing upon the controverted issues to be determined by the court. The trial court admitted this summary in evidence as informative only and not conclusive, and permitted the parties to refer to the original books as much as they desired and gave them ample time to do

so. All other evidence relating to this indebtedness, the books and entries therein which either party offered, was received by the court. There is no contention now that this summary was not an appropriate and accurate one compiled from the books of the partnership. There was no error in receiving it in evidence."

The entire ledger account of this transaction was in court. The payroll records were in the custody of the defendant, or at least were when last heard of. The daily reports were in the court room and the plaintiff's cost account was in evidence. It is true that a truck load of supporting evidence may have been available such as the cancelled checks in payment of labor, materials and other items, receipted bills from suppliers of material and even correspondence leading up to the expenditure of a particular sum, but that is not essential evidence but only corroborative. The summaries made by the auditor were simply a convenient breakdown of the account for the information of the Master and the Court and as to everything but the payroll records, mysteriously missing, the original records were available for inspection and cross-examination.

V.

Effect of Rule 52 of Federal Rules of Civil Procedure for the United States District Courts.

Paragraph 52 (a) of the rules for district courts is quite controlling in this case.

The rule reads as follows:

FINDINGS BY THE COURT.

"(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the

appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If any opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b). As amended Dec. 27, 1946, eff. March 19, 1948."

The rule has been construed in many cases of which we cite the following without quotation:

Supreme Court Constructions.

Mayo v. *Lakeland Highlands Canning Co.*, Fla. 60 S. Ct. 517, 309 U. S. 310, 84 L. Ed. 774.

Leishman v. *Associated Wholesale Electric Co.*, 63 S. Ct. 543, 318 U. S. 203, 87 L. Ed. 714.

Kelley v. *Everglade Drainage Dist.*, 63 S. Ct. 1141, 319 U. S. 415, 87 L. Ed. 1485.

Schneiderman v. *U. S.*, 63 S. Ct. 1333, 320 U. S. 118, 87 L. Ed. 1796.

District of Columbia v. *Pace*, 64 S. Ct. 406, 320 U. S. 698, 88 L. Ed. 408.

Reconstruction Finance Corp. v. *Denver & R. G. W. R. Co.*, 66 S. Ct. 1282, 328 U. S. 495, 90 L. Ed. 1400.

U. S. v. *U. S. Gypsum Co.*, 68 S. Ct. 525, 333 U. S. 364, 92 L. Ed. 746.

Graver Tank & Mfg. Co., Inc. v. *Linde Air Products Co.*, 69 S. Ct. 535, 336 U. S. 271, 93 L. Ed. 672.

U. S. v. *Yellow Cab Co.*, 70 S. Ct. 177, 338 U. S. 338, 94 L. Ed. 150.

U. S. v. *National Ass'n of Real Estate Boards*, 70 S. Ct. 711, 339 U. S. 485, 94 L. Ed. 1007.

Graver Tank & Mfg. Co. v. *Linde Air Products Co.*, 70 S. Ct., 854, 339 U. S. 605, 94 L. Ed. 1097.

Timken Roller Bearing Co. v. *U. S.*, 71 S. Ct. 971, 341 U. S. 593, 95 L. Ed. 1199.

U. S. v. *Oregon State Medical Soc.*, 72 S. Ct. 690, 343 U. S. 326, 96 L. Ed. ____.

Besser Mfg. Co. v. *U. S.*, 72 S. Ct. 838, 343 U. S. 44, 96 L. Ed. ____.

The subject was discussed in the case of *Kansas City Stock Yards Company* v. *Anderson*, 199 F. 2d 91 (Eighth Circuit Court of Appeals, 1952) and reported also in 36 A. L. R. 2d, page 1, in this language:

> "Upon a trial without a jury, in which the Court finds the issues in favor of the plaintiff, the appellate court must take that view of the evidence most favorable to the plaintiff. Findings of fact by a court upon a trial without a jury may not be set aside unless clearly erroneous; if the findings are sustained by substantial evidence considered in a light most favorable to the prevailing party, they should be sustained by the appellate court."

See also Am. Jur., Appeal, Secs. 895 to 912; *Van Dreal* v. *Van Dreal*, 10 Cir., 214 F. 2d 715; *Payne* v. *Pray*, 10 Cir., 173 F. 2d 149; *Wyoming Railway Company* v. *Herrington*, 10 Cir., 163 F. 2d 1004, and *Foree* v. *Tri-County Electric Association, Inc.*, 10 Cir., 5097, not yet reported—November term, 1955.

We would be lacking in courtesy to the Court if we

undertook to present or discuss all of the evidence that was introduced in this case, conflicting as it was, upon the several propositions involved. All respondent feels that it should do here, since the subject has been injected into petitioner's brief, is to point out that there was evidence which the learned Judge of the District Court considered and weighed in making findings of fact in this case, and such being so, the findings of fact must stand as established and as affirmed by the Court of Appeals.

CONCLUSION.

The defendant in this case before the trial court moved to dismiss the complaint on the ground it failed to state a cause of action. After argument this motion was overruled and the defendant answered and proceeded to trial.

The trial resulted in the findings of fact in conformity with the complaint. Each party offered evidence in support of its pleadings and the court found the facts and law in favor of plaintiff.

The question of damages was referred to a Special Master after the court had found the facts and law in favor of the plaintiff.

On the question of damages the defendant offered no affirmative evidence of any kind.

The Special Master found for the plaintiff on its claims, the defendant filed objections before the trial judge, some of which was sustained and judgment rendered for the balance of the claims. The plaintiff claims no cross-errors nor filed any cross-appeal.

The Circuit Court of Appeals affirmed the judgment and denied a Petition for rehearing. The defendant in the trial court is the petitioner here.

The petitioner has come here on three points, the first of which is that the contract between the parties must be enforced according to all of its terms in the absence of a determination of bad faith, fraud or deceit. We have stated before that that issue is not involved in the case as the respondent has never made any claim that the County or its engineers were guilty of bad faith.

The second point made is that the Court of Appeals committed error in the interpretation of the contract. The only error actually complained of here is that the Court of Appeals retained in the contract documents the provisions which were written in by the contracting parties, namely that the engineers should be in control and set stakes showing the location of the bridge and the center lines of the piers. The petitioner has tried to read those provisions out of the contract and respondent has insisted that it stay in. (See opinion of the Court of Appeals, Appendix, p. A4 and A5, Petitioner's Brief.) Subparagraphs (a), (b) and (c) under point 2 are actually a part of the same argument and are merely efforts to relitigate before this Court the identical questions of fact submitted to and disposed of by the trial court. It is to be noted that not once in petitioner's brief is there any argument in support of its ground that the findings are not supported by the evidence.

On the record as a whole it must appear that the petitioner had a fair trial; that the trial court exercised its prerogative in the proper way in passing upon the credibility of the witnesses and the weight to be attached to the evidence and it cannot be claimed that the Court of Appeals is wrong merely because petitioner thinks the court should have passed upon the matter in a different way.

It is respectfully submitted that the Petition for Writ of Certiorari does not show any reasons for a review by this court, and should be denied.

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APPENDIX.

Findings of Fact by District Court.

Transcript of Record, Vol. 1, Pages 47, 48, 49, 50, 51, 52, 53.

The Court makes the following Findings of Fact and Conclusions of Law in the above entitled case.

Findings of Fact.

1. (a) The plaintiff, William J. Howard, Inc., is a corporation organized and existing under the laws of and a citizen of the State of Illinois.

(b) The amount involved in the present case is in excess of $3,000.00.

(c) The defendant is a political subdivision of the State of Kansas and a body politic and corporate of said state.

(d) The defendant and plaintiff entered into a contract whereby the plaintiff agreed to construct new parts and rebuild old parts of a bridge across the Kansas River at 12th Street in Kansas City, Kansas which contract and plans and specifications for the work to be done were drafted by the defendant's agents, the engineering firm of Sverdruf and Parcel, Inc., a corporation of St. Louis, Missouri. The contract was dated July 15, 1946. All necessary legal proceedings preliminary to the contract were duly complied with.

(e) The work under the contract was satisfactorily completed and accepted by the defendant on August 8, 1948, and is now being used as a public highway. The contractor plaintiff and owner defendant have not reached a settlement as to the balance due to the plaintiff from the defendant.

(f) Among other work, the contract provided for rebuilding Pier No. 2 at a point in the bed of the river at the same location as was formerly occupied by Pier No. 2 of the predecessor bridge which was washed out and substantially destroyed by high water on or about April 17, 1945. The plaintiff contends that it received instructions from the defendant's engineers under the terms of the contract to dig at a certain spot in the river bed and remove the remains of Pier No. 2 of the predecessor bridge; that it had no authority to dig at any other places; that the old pier had moved from its original location, and for purposes of reconstruction such removal was unnecessary and improper, and caused plaintiff great delay and expense in completing the job; that such work was caused by the mistake and error of the agents of the defendant in not giving the proper location to do the work under the contract for the construction of Pier No. 2.

The defendant contends the old Pier No. 2 had not moved from its original location and the work was done at the correct site; also the defendant contends that under the terms of the contract, the plaintiff and not defendant's engineer was required to determine the site of the work and to deliver to defendant a completed structure.

2. The Court finds from the evidence, that the old Pier No. 2 had moved from its original location; that under the terms of the contract the defendant was required to furnish the correct site for the work, and determine the correct center line of said pier, and it failed to do so, but directed work to be done at another site, and allowed work to be done at the other site for about sixteen months; and during this time approved estimates for work done by plaintiff upon which plaintiff received payments from the defendant; that when the error was discovered, defendant's engineers directed work to be done by plaintiff at a new location, which plaintiff did and completed Pier No. 2 and

the bridge; that the defendant refused to pay plaintiff for work done under the contract at the correct site of Pier No. 2, and there is due to plaintiff therefor a sum exceeding $3,000.00. That plaintiff made timely request of the defendant's engineers for the establishment of the center line of Pier No. 2, and that defendant's engineers did not comply with that request, but did notify the plaintiff to construct Pier No. 2 at a location where the remains of the Pier No. 2 of the predecessor bridge could be seen in the surface of the water, and that such location did not represent the correct center line or any other line of Pier No. 2 to be constructed.

3. That defendant is withholding from plaintiff as retained percentage, ten (10%) per cent, amounting to the sum of $16,679.97 on the excuse that defendant is entitled to liquidate damage under the contract of Thirty-five ($35.00) Dollars per day after 300 days, for delay in completing the bridge. At defendant's calculation of 445 days' delay, the liquidated damages due under this claim would be $15,575.00, and in any event, a balance is due plaintiff of $1,096.37.

4. The Court finds that the delay was caused by the acts of the defendant's engineers in ordering work at the incorrect site, and such delay was not caused by any act or fault of the plaintiff, nor brought about by any of the conditions or reasons or hazards assumed by the plaintiff under said construction contract, and plaintiff is entitled to the full amount of said retained percentage of $16,671.97.

5. The Court finds as a matter of fact that because of the mistakes of the County and its engineers as alleged in the complaint and found generally by the Court, the plaintiff laid out for labor, for rentals on hired equipment, for the rental value on its own equipment, for materials, freight, insurance and other direct costs, including materials brought by the plaintiff from its own yards, the sum

of $90,426.36. This is the amount of money paid for these items which would not have been incurred but for the mistake of the County and its engineers.

6. The Court finds as a matter of fact that in bidding on this contract the plaintiff took into consideration the normal climate and flood conditions at Kansas City and made allowances therefor, and the plaintiff's estimates in this regard during the original 300 calendar days were accurate, but in the extended period beyond said 300 days, the plaintiff ran into a period of these high waters occurring with great frequency and of unusually cold weather when no work could be done, greater than had existed during the original 300 calendar days. That there were 16 days in February, 1948, 26 days in March, 1948 and 10 days in August, 1948 when work was completely suspended from these causes, but because of the scarcity of labor, it was impossible to lay off the workmen with any reasonable expectation of securing the same or other workmen when the water subsided, and so the plaintiff was compelled to keep at full wages its help during those three several periods, laying out in such wages the total amount of $17,038.20. This item, however, takes into consideration the additional insurance paid on such additional payroll, the rental of equipment paid to others during those periods and the rental value of the plaintiff's own equipment during the same periods, all as set forth in paragraph 16 of the complaint, and nothing is therefore added for those items, the total being $17,038.20.

7. The Court finds as a matter of fact that directly upon being awarded the contract to reconstruct the Twelfth Street Bridge the plaintiff made a subcontract with the Kansas City Structural Steel Company to fabricate the necessary steel to perform the contract, a considerable part of which was delivered to the job immediately, but because of the mistake made by the County and its en-

gineers, the same had to lie where delivered, subject to the ravages of the elements, so that when it was possible to install the same in place, all of that steel had to be scraped and cleaned and repainted and that the cost of such reconditioning and repainting paid by the plaintiff was $565.85.

8. The Court finds as a matter of fact that the plaintiff maintained in Chicago one office and two yards in which it kept materials, supplies and equipment, and employed help in its yards and help in the office and had other expenses, such as telephone and telegraph service, power and light bills, which the plaintiff has classified as administrative and plant overhead which the plaintiff took into consideration in making the original bid. The plaintiff has claimed and is entitled to be paid a reasonable amount for administrative and plant overhead, based upon its outlay for additional time and work and cost, due to the mistakes made by the County and its engineers and ten (10%) per cent of the total amount of such additional outlay is reasonable and is in line with the overhead allowed by the State Highway Commission in its general specifications for road and bridge construction.

9. The Court finds as a matter of fact that the plaintiff in this case is entitled to a profit upon the work done by it and the money laid out by it in performance of its contract, and a profit was taken into consideration in the original bid. On the excess amount laid out for labor, materials, and all of the other items mentioned in Finding No. 8, caused by the mistake of the County and its engineers, the plaintiff is entitled to a reasonable profit, and that fifteen (15%) per cent thereof would be a reasonable profit. That the amount of the outlay and expense on which profit should be computed is the composite amount of the items recoverable on the second count of the complaint without interest.

10. That the total amount which the plaintiff is entitled to recover from the defendant on Count Two of the complaint is $136,658.47.

Conclusions of Law.

1. The Court has jurisdiction of the subject matter and of the parties hereto.

2. Jurisdiction is based on diversity of citizenship and the jurisdictional amount involved is in excess of $3,000.00.

3. The action sounds in contract and not in tort, and the defendant is suable under the laws of the State of Kansas as a body politic and corporate.

4. That the defendant is liable for the acts of its authorized agents and engineers.

5. That the contract between the plaintiff and the defendant was breached in a material manner by the defendant, and the defendant is liable to the plaintiff for such breach.

6. By agreement of the parties the question of liability of the defendant having been submitted to the Court as a separate issue, said issue is found in favor of the plaintiff.

7. The Court concludes as a matter of law that Sections 5.6 and 5.10 of the Kansas State Highway Commission Standard Specifications for highway and bridge construction were not deleted nor superseded by the supplemental specifications, and said Sections 5.6 and 5.10 remain a material part of the construction contract between the plaintiff and the defendant.

8. That under the provisions of Section 5.6 of the Standard Specifications promulgated by the Kansas State Highway Commission for road and bridge construction it was the obligation of the defendant and its engineer, upon

request of the plaintiff as contractor, to set stakes determining the center line of all piers, pedestals and abutments. It was the obligation of the contractor to construct and erect said piers at the site and in accordance with the engineer's stakes and marks, and the contractor stands charged with full responsibility for conformity and agreement of the work with such stakes and marks. And under the provisions of Section 5.10 of the Standard Specifications of the Kansas State Highway Commission it was the obligation of the contractor to do "no work without lines and grades having been given by the engineers. And under said section, work done contrary to or regardless of the instructions of the engineer, work done beyond the lines shown on the plans, or as given except as herein specified, or any extra work done without authority, shall be construed as unauthorized, and will not be paid for under the provisions of the contract, and could be ordered removed or replaced at the contractor's expense."

9. The Court concludes as a matter of law that if there was a fixed object in the channel of the river, such as the remains of Pier No. 2 of the predecessor bridge, and the defendant's engineer instructed the plaintiff in answer to its request for the center line of the new pier, to build a new pier in the exact location as the one which appeared in the river, that would be a sufficient compliance with plaintiff's request for the establishment of a center line, and the plaintiff was justified in and had a right to rely thereon and act accordingly.

10. The payroll records of the plaintiff which were lodged with the Clerk of this Court by order of this Court were received by counsel for the defendant, as shown by the Clerk's records and receipts, but there is no record in the Clerk's office that they ever were returned to him, and the plaintiff was unable to discover the whereabouts of said payroll records at the hearing before the Special Mas-

ter. Under the circumstances, secondary evidence of said payroll records was admissible.

11. The plaintiff's auditors had made summaries and the plaintiff itself kept a cost account of this particular job. The cost account was introduced in evidence and was admissible as an original record kept by the plaintiff. The summaries made by the plaintiff's auditors, in view of the fact that the plaintiff's ledger and cost account and all the daily reports were in evidence, were admissible in evidence but not conclusive.

12. On the first count of the complaint the plaintiff is entitled to recover the sum of $16,671.91, and on second count thereof, plaintiff is entitled to recover the sum of $136,658.47. The cost of the action including the fee and expenses of the Special Master shall be assessed against the defendant.

DELMAS C. HILL,
United States District Judge.

Filed Sept. 30, 1954.

Findings of Fact by the Special Master.

Transcript of Record, Vol. 1, Pages 23, 24, 25, 26, 27 and 28.

1. The Court after a trial of the issues in this case found in favor of the plaintiff on the subject of liability, leaving only the question of the amount of the judgment to be rendered to be determined by subsequent proceedings by a Special Master. The Special Master assumes that the Court by its notice of its finding of liability found all of the issues under the pleadings in favor of the plaintiff, which would include a finding of fact of every allegation contained in the complaint save only the allegations as to the amount due the plaintiff from the defendant, and the Master, in making his findings and conclusions, has proceeded upon this theory.

2. The Master finds as a matter of fact that the plaintiff is entitled to recover on the first count of the complaint the full amount sued for which was an amount retained by the defendant and never paid, admittedly to the total of $16,671.97, and that this amount should bear interest at six (6%) per cent per annum from the completion and acceptance of the project on September 17, 1948, amounting in all to $21,711.93.

3. (a) The Master finds as a matter of fact that because of the mistakes of the County and its engineers as alleged in the complaint and found generally by the Court, the plaintiff laid out for labor, for rentals on hired equipment, for the rental value on its own equipment, for materials, freight, insurance and other direct costs, including materials brought by the plaintiff from its own yards, the sum of $90,426.36. This is the amount of money paid for these items which would not have been incurred but for the mistake of the County and its engineers.

3. (b) In addition to the amount found under 3 (a), the Court finds as a matter of fact that because of the mistake of the County and its engineers, and after its discovery on or about the 12th of November, 1947, the plaintiff, in order to complete the job with all possible expedition, constantly urged by the engineers to hurry it along, was unable to obtain in the labor market additional help sufficient to run several shifts, but used the men it had been able to employ and worked them overtime, paying premium wages for the overtime of one and one-half and two times their regular wages in the total amount of $4,447.01. That the supplemental specifications compelled the contractor to carry workmen's compensation and public liability and property damage insurance, the premiums for which were based upon the payroll, and because of this extra payroll premium time the plaintiff paid out $743.44 additional insurance premium, making a total amount ex-

pended by the plaintiff for premium time and insurance thereon of $5,290.45.

3. (c) Because of the mistake of the County and its engineers the completion of this project was prevented within the original 300 calendar days, and was not susceptible of accomplishment until 445 additional days elapsed, thus projecting this project into a period of time when, because of national labor unrest and strikes in the major industries and the settlement of those strikes by increasing wages, all wages of such labor as plaintiff employed were increased, and that the average increase over the period of time beyond the original 300 calendar days amounted to 9.1 per cent more than would have been paid had the mistake not been made and the project completed within the contract period. That the plaintiff was compelled to pay more for labor in the extended period in the total amount of $12,634.17 and a consequent increase in its insurance premium on this labor of $2,526.83, making a total amount laid out by the plaintiff for higher priced labor and insurance thereof of $15,161.00.

3. (d) The Master finds as a matter of fact that in bidding on this contract the plaintiff took into consideration the normal climate and flood conditions at Kansas City and made allowances therefor, and the plaintiff's estimates in this regard during the original 300 calendar days were accurate, but in the extended period beyond said 300 days, the plaintiff ran into a period of these high waters occurring with great frequency, and of unusually cold weather when no work could be done, greater than had existed during the original 300 calendar days. That there were 16 days in February, 1948, 28 days in March, 1948 and 10 days in August, 1948 when work was completely suspended from these causes, but because of the scarcity of labor, it was impossible to lay off the workmen with any reasonable expectation of securing the same or other work-

men when the water subsided, and so the plaintiff was compelled to keep at full wages its help during those three several periods, laying out in such wages the total amount of $17,038.30. This item, however, takes into consideration the additional insurance paid on such additional payroll, the rental of equipment paid to others during those periods and the rental value of the plaintiff's own equipment during the same periods, all as set forth in paragraph 16 of the complaint, and nothing is therefore added for those items, the total being $17,038.20.

3. (e) The Special Master finds as a matter of fact that directly upon being awarded the contract to reconstruct the Twelfth Street Bridge the plaintiff made a subcontract with the Kansas City Structural Steel Company to fabricate the necessary steel to perform the contract, a considerable part of which was delivered to the job immediately, but because of the mistake made by the County and its engineers, the same had to lie where delivered, subject to the ravages of the elements, so that when it was possible to install the same in place, all of that steel had to be scraped and cleaned and repainted and that the cost of such reconditioning and repainting paid by the plaintiff was $565.85.

3. (f) The Special Master finds as a matter of fact that the plaintiff maintained in Chicago one office and two yards in which it kept materials, supplies and equipment, and employed help in its yards and help in the office and had other expenses, such as telephone and telegraph service, power and light bills, which the plaintiff has classified as administrative and plant overhead which the plaintiff took into consideration in making the original bid. The plaintiff has claimed and is entitled to be paid a reasonable amount for administrative and plant overhead, based upon its outlay for additional time and work and cost, due to the mistakes made by the County and its en-

gineers and ten (10%) per cent of the total amount of such additional outlay is reasonable and is in line with the overhead allowed by the State Highway Commission in its general specifications for road and bridge construction. That the amount of such ten (10%) per cent overhead is $12,848.17.

3. (g) The Special Master finds as a matter of fact that the plaintiff in this case is entitled to a profit upon the work done by it and the money laid out by it in performance of its contract, and a profit was taken into consideration in the original bid. On the excess amount laid out for labor, materials, and all of the other items mentioned in the foregoing subdivision of this finding 3, caused by the mistake of the County and its engineers, the plaintiff is entitled to a reasonable profit, and that fifteen (15%) per cent thereof would be a reasonable profit. That the amount of the outlay and expense on which this profit should be computed is the composite amount of all of the items mentioned in this finding 3, or $141,329.83, which profit would amount to the sum of $21,199.47.

3. (h) That the total amount which the plaintiff is entitled to recover from the defendant on Count Two of the complaint without interest added is $164,154.59, and to this should be added interest at the rate of six (6%) per cent per annum from the 17th day of May, 1949, that being the date on which the defendant formally disallowed and refused to pay the plaintiff its claim, and amounting as of the date hereof to a total of $207,518.54.

4. The Special Master finds as a matter of fact that the cost of the original action and of this special proceeding should be taxed against the defendant, and should include the cost of the reporters in making both records and of the Special Master's compensation and expenses.

The Special Master reminds the Court that the record

of the original trial in this case was a complex and not a simple matter and the Special Master had to review that entire record and all of the exhibits and depositions and the voluminous briefs filed by counsel in order correctly to understand what was specifically referred to by the order of his appointment. That the hearing on the reference consumed five days of the Special Master's time away from home and that he incurred expenses in connection therewith amounting to $70.30. That as soon as the reporter had filed the official record of the special hearing, the Special Master carefully reviewed the same and the exhibits introduced in evidence, and for greater accuracy in checking the figures and amounts, employed the firm of Paxson & Richel, Certified Public Accountants of Topeka, to check the same, at an expense of $300.00, and the report of said certified public accountants is attached to this report of the Special Master.

Conclusions of Law.

1. The payroll records of the plaintiff which were lodged with the Clerk of this Court by order of this Court were received by counsel for the defendant, as shown by the Clerk's records and receipts, but there is no record in the Clerk's office that they ever were returned to him, and the plaintiff was unable to discover the whereabouts of said payroll records at the hearing before the Special Master. Under the circumstances, secondary evidence of said payroll records was admissible.

2. The plaintiff's auditors had made summaries and the plaintiff itself kept a cost account of this particular job. The cost account was introduced in evidence and was admissible as an original record kept by the plaintiff. The summaries made by the plaintiff's auditors, in view of the fact that the plaintiff's ledger and cost account and all

the daily reports were in evidence, were admissible in evidence as informative but not conclusive. The Master has considered the same but no evidence having been offered by the defendant in contradiction thereof and the same having been made in an orderly and intelligent manner with appropriate reference to the ledger accounts, the special Master has considered them not only informative but has given them full consideration in arriving at the amount of the judgment which should be entered in this case.

3. This Court having adjudicated the issues in favor of the plaintiff and against the defendant, and found in favor of the plaintiff on the subject of liability, the Special Master concludes as a matter of law that the plaintiff is entitled to recover judgment against the defendant on the First Count of the complaint in the sum of $16,671.91 with interest at six (6%) per cent per annum from September 17, 1948, that being the date of final acceptance of the project by the defendant, and is entitled to a judgment against the defendant on the Second Count of the complaint for the sum of $164,154.59 with interest thereon at the rate of six (6%) per annum from the 17th day of May, 1949, said date being the time the defendant formally disallowed and refused to pay the plaintiff's claim, interest on both counts being computable to the date of the entry of judgment by the Court, and for all the costs of the action and this reference.

The foregoing report, findings of fact and conclusions of law are respectfully submitted by the undersigned Special Master to the Court for its consideration and further action.

HARRY K. ALLEN,
Special Master.

Filed with attachments Jan. 15, 1954.